No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER SECOND INTERIM REPORT ON MOTIONS FOR SUMMARY JUDGMENT AND RENEWED MOTIONS FOR INTERVENTION

April 9, 1992

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GLOSSARY OF SELECTED TERMS

An "*acre foot*" is that quantity of water that will cover an acre of land to the depth of one foot. It is the equivalent of 43,560 cubic feet. It is common to refer to a right to a specified number of acre feet in a water year or during an irrigation season.

A "*call*" is a demand made by or on behalf of senior water appropriators requiring the holders of more junior appropriation rights to refrain from diverting and using water until the senior's prior rights have been met.

There will be many references to the priorities, requirements, and supplies of "canals." In such instances the word "*canal*" is used as representative of the lands under or served by the canal.

"*Consumptive use*" refers to the water lost by evaporation and transpiration in the course of diversion and use. It is represented by the difference between the water diverted and that which returns to the stream.

"*Instream use*" refers to nondiversionary use by leaving water in the stream to support wildlife, recreational and other values served by the natural stream environment.

"*Irrigation requirement*" is the quantity of water (including unavoidable waste), exclusive of precipitation, that is required for crop production.

"*Irrigation season*" is used in this Report as defined in the Decree to include the months of May through September during which irrigation deliveries to lands are made in the North Platte Basin.

"*Natural flow*" or "direct flow" refers to all water in a stream except that which comes from storage water releases.

The western law of "*prior appropriation*" is the body of water law adopted widely by arid western states, including Colorado, Wyoming and Nebraska, under which

water rights are administered on a priority of appropriation basis with senior water rights holders being entitled to receive their entire requirements before more junior rights come into priority.

"*Return flow*" is the residual which returns to a stream of water which has been diverted and used. It may be "visible" or "invisible" depending upon whether it takes the form of surface flows or underground percolation.

"*Second foot*" is an abbreviated expression for "one cubic foot per second of time." It is a unit of measurement of the flow of water.

"*Water year*" as used herein means the twelve months between and including October 1 of each year and September 30 of the following year. This is the water year of Nebraska, Wyoming and Colorado, and is the standard water year employed by the United States Geological Survey.

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April 9, 1992

I. INTRODUCTION

A. Background

The North Platte River originates in the mountains of northern Colorado and then flows north along the eastern slope of the Continental Divide into southeastern Wyoming about eighty miles west of Cheyenne. It continues in a generally northerly direction to Casper, Wyoming, collecting along the way the flows of its most significant tributaries including the Medicine Bow and the Sweet-

water Rivers. Near Casper, the river curves and flows in a southeasterly course to the Wyoming-Nebraska line twenty miles upstream of Scottsbluff, Nebraska. It then continues on a more easterly course until it joins the South Platte River at the town of North Platte, Nebraska, to form the Platte River. The Platte River then arcs first southeasterly and then mostly northeasterly through Nebraska and joins the Missouri River, a short distance downstream of Omaha.[1]

As early as about 1870, settlers started to use the North Platte River for irrigation by direct diversions of natural flows, and by 1913 Pathfinder Dam was built and in operation forty miles upstream of Casper. Pathfinder, the second dam to be completed in the United States under the 1902 Reclamation Act, impounds North Platte flows in a 1,016,507 acre-foot capacity reservoir. Pathfinder stores the entire river at that point during much of the year, and during those periods an essentially new river rises at the Alcova Dam element of the Kendrick Project a short distance below Pathfinder Dam. That new river is entirely fed by return flows and downstream tributary contributions.

The construction of Pathfinder Dam as a component of the Bureau of Reclamation's North Platte Project started a chain of development in the North Platte Basin that has continued ever since. As a result, by the 1930's the North Platte and many of its major tributaries were—as they still are—over-appropriated.[2] Increased

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[1] The North Platte River's length is about 70 miles in Colorado, 435 miles in Wyoming and 183 miles in Nebraska. Maps of the North Platte drainage basin are attached as Appendix A-1 and Appendix A-2.

[2] *See, e.g.*, Report of the Honorable Michael J. Doherty, Special Master (1944) ("Doherty Report") at 37 ("The North Platte River has long been the subject of potential controversy between three litigating States. This has been due to the central fact that the dependable natural flow of the river during the irrigation season

human consumption and the network of on-stream reservoirs regulating flows have greatly reduced average flows and significantly altered the river's channel in the important wildlife habitat areas in central Nebraska.[3]

Traditionally, the North Platte River has been appropriated for agricultural uses and, to a much lesser extent, for municipal and industrial uses. In-stream values—aesthetic, recreational, ecological, environmental and historic—have remained backstage until quite recently. Today, though, the traditional water-using interests face claims demanding that a share of the North Platte flows remain in the river to serve wildlife, recreational, and other instream values.

The Supreme Court first apportioned the waters of the North Platte River by decree in 1945, after eleven years of litigation involving the states of Colorado, Wyoming, and Nebraska as well as the United States.[4] *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) ("the Decree").[5] (This early litigation is referred to in this Report as "the original proceedings.")

During the original proceedings, the Court examined whether upstream junior appropriators in Wyoming and Colorado wrongfully were depriving senior appropriators in Nebraska of North Platte waters. At that time the

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has long been over-appropriated. So far as this river is concerned, neither Wyoming nor Colorado has ever recognized any extension of priorities across state lines, nor have they ever limited or regulated diversions by their appropriators in subordination to or for the benefit of senior appropriators of a lower State.")

[3] *See, e.g.*, Paul A. Johnsgard, *The Platte: Channels in Time* at 82 (1984).

[4] The United States was an intervenor in the original proceedings leading to the 1945 Order and Decree and has remained as a party in the current proceedings.

[5] The Decree, as modified in 1953, is attached as Appendix B.

Court referred the matter to Special Master Michael Doherty, whose final report (the "Doherty Report") formed the basis for the Decree that emerged. The Decree's polestar is its allocation of natural flow waters in the "pivotal" reach of the North Platte mainstem, between Whalen Dam in Wyoming, forty miles upstream of the Wyoming-Nebraska state line, and the Tri-State Diversion Dam in Nebraska, one mile downstream of the state line. The Decree apportioned natural flows in this section of the mainstem 75 percent to Nebraska and 25 percent to Wyoming during the May 1 through September 30 irrigation season. Decree ¶ V. In so doing, the Decree recognized some priorities across state lines, and protected the pivotal reach against both certain further Colorado development, *id.* ¶ I, and certain further upstream Wyoming development. *Id.* ¶¶ II, IV.

B. The Current Proceedings

Nebraska petitioned the Court to enforce the Decree and for injunctive relief on October 6, 1986,[6] and Wyoming answered and counterclaimed on March 18, 1987.[7] The current proceedings are before the Court pursuant to the "changed conditions" or "reopener" provision of the Decree, under which the Court retained jurisdiction for the purpose of any "order, direction, or modification" of the Decree.[8] Since the Decree was entered, development has in no sense stood still on the North Platte River. Aside from 1953 stipulated modifications to the Decree,

[6] Petition For An Order Enforcing Decree And For Injunctive Relief (Oct. 6, 1986) ("Nebraska Petition").

[7] Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim (Mar. 18, 1987) ("Wyoming Answer and Counterclaim").

[8] Changed conditions, Decree ¶ XIII(f), and threatened construction in Nebraska or Wyoming, *id.* ¶¶ XIII(b)-(c), are examples of events set forth in the Decree that might prompt the Court's review.

however, more than forty years of interstate administration under the Decree went by before North Platte apportionment issues returned to the Court in 1986.

In her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River by her intended administration of Grayrocks Reservoir's operations and releases on the Laramie River, by her intended construction of the Corn Creek project diversion facility at the Laramie's confluence with the North Platte River, by her proposed construction of a storage reservoir on the Deer Creek stream, which enters the North Platte between Pathfinder and Guernsey Dams, and by her efforts to prevent the United States Bureau of Reclamation from continuing historic off-season storage in the Inland Lakes in Nebraska. Nebraska Petition ¶ 3.

Wyoming counterclaims that Nebraska is circumventing the Decree by demanding natural flows for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree, and by demanding both natural flows and storage water from sources above Tri-State Dam and diverting those waters to uses below the Tri-State Dam that are not recognized by the Decree. Wyoming Answer and Counterclaim at 8-9.

Since 1986, the parties' positions have evolved and been shaped by the proceedings. Thus, the issues presented for decision in the context of the summary judgment motions before me are in some instances somewhat different from the literal claims of the initial pleadings. Indeed, even the summary judgment motions as originally articulated have evolved during the course of several rounds of briefings and hearings.

In a nutshell, the following events have occurred in the current proceedings. The matter was referred to me as Special Master on June 22, 1987, together with the five

then-pending motions to intervene.[9] The would-be intervenors were Basin Electric Power Cooperative ("Basin"), the operator of Grayrocks Dam and Reservoir on the Laramie River in Wyoming; the Central Nebraska Public Power and Irrigation District ("Central") and the Nebraska Public Power District ("NPPD"), downstream water users in Nebraska; the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust");[10] and the National Audubon Society ("Audubon"). The latter two speak for wildlife interests downstream of Tri-State Dam, including threatened and endangered species such as the whooping crane, and critical wildlife habitat in the Big Bend Reach of the Platte River in central Nebraska. The Big Bend Reach is an important migratory route or staging area for numerous species of migratory birds, including the whooping crane and the sandhill crane.[11]

[9] The Court's June 22, 1987 Order referring this matter to me states:

> It is ordered that Owen Olpin, Esquire, of Los Angeles, California, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

Nebraska v. Wyoming, 483 U.S. 1002 (1987).

[10] The Platte River Trust was established in 1978 by Basin as a result of litigation over the construction of the Grayrocks Dam and Reservoir in Wyoming. Grayrocks supplies process and cooling water to the Laramie River Station, a large coal-fired steam electric power generating plant. Both the reservoir and the power plant were built by the Missouri Basin Power Project, a consortium of consumer and publicly-owned utilities supplying power in eight states, including Nebraska and Wyoming. *Amicus* Basin operates the power plant and reservoir. In 1978, Nebraska joined a lawsuit filed by several environmental groups in federal district court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a section 404 permit by the Army Corps of Engineers, and seeking an injunction against construction of Grayrocks on the grounds of non-compliance with the National Environmental Policy Act of 1969 and the Endangered Species Act of 1973. The case settled, creating the Platte River Trust as part of the settlement. Agreement of Settlement and Compromise, *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. Dec. 4, 1978) ("1978 Settlement Agreement"). The Platte River Trust has a mandate to protect and maintain the habitat for migratory bird species on the Platte River.

I denied the motions for intervention on April 1, 1988, but invited the five movants to participate in the case as *amici*, to represent wildlife and other interests and to assist in the development of expert evidence.[12] All but one of the *amici* have participated actively since then, filing briefs and memoranda and arguing at hearings. I reported to the Court on June 14, 1989 the reasons for my 1988 denial of the intervention motions. *See* Special Master, First Interim Report (June 14, 1989) ("First Interim Report") at 6-14.

The wildlife issues downstream of Tri-State Dam were also invoked by Nebraska in her January 11, 1988 petition to the Court to amend her earlier October, 1986, petition primarily to enforce and modify, if necessary, the Decree to protect instream uses in Nebraska. Nebraska noted that "the principal in-stream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat."[13] The Court denied that motion without explanation. *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

[11] *See generally* Paul J. Currier, Gary R. Lingle, John G. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985).

[12] *See* Seventh Memorandum Of Special Master And Order Regarding *Amicus Curiae* Status Of The National Audubon Society, The Platte River Trust, Basin Electric And The Nebraska Districts (Apr. 1, 1988) ("Seventh Memorandum") at 4, 14.

[13] Brief In Support Of Motion To Amend Petition For An Order Enforcing Decree And For Injunctive Relief (Jan. 11, 1988) at 2.

On September 11, 1987, Wyoming moved for summary judgment on all the questions raised in Nebraska's October, 1986 petition. Wyoming acknowledged that Nebraska's petition accurately described Wyoming's proposed developments on the North Platte River and its tributaries and conceded impacts on North Platte flows. Wyoming's position, however, was that, given that the basis of Nebraska's petition was to enforce (not to modify) the Decree, all the contested developments and activities were sanctioned in some manner by the Decree. Thus, Wyoming contended that there were no material factual issues and that the case could be resolved as a matter of law on the face of the Decree. As reported in June, 1989, in my First Interim Report, I denied Wyoming's motion for summary judgment in its entirety but left open the possibility of summary adjudication following further factual development. The Court received and ordered the First Interim Report to be filed without inviting the parties to file exceptions. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

An intensive period of discovery followed my denial of Wyoming's motion, during which I toured the North Platte River and examined the various developments along its entire course. I later returned to the Big Bend Reach of the Platte River in central Nebraska to observe the spring migration of the sandhill crane and other migratory bird species. Following my original field trip to the North Platte Basin in August, 1990, I convened a status conference during which it became clear to me that, as a consequence of the factual development during the previous year, the parties believed summary adjudication might be appropriate on some issues in the case. Accordingly, I set a briefing schedule for the present motions for summary judgment.

During February and March, 1991, all the parties moved for summary judgment on one or more of the

issues.[14] Those motions were briefed and a hearing was held on the motions in Salt Lake City, Utah on June 7 and 8, 1991. Subsequently, the parties filed post-hearing briefs. At the Salt Lake hearing, I also invited the *amici* to re-petition for intervention if appropriate. Three of the *amici* renewed their earlier petitions to intervene and those petitions were briefed in the ordinary course.

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[14] The motions for summary judgment, in a nutshell, are as follows. Nebraska moved for summary judgment to the effect that: (1) The Inland Lakes have a December 6, 1904, priority date; (2) Nebraska is entitled to all flows of the Laramie River over and above Colorado's and Wyoming's entitlement as set forth in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *amended*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957); and (3) the equitable apportionment between Nebraska and Wyoming was predicated upon adequate return flows below Tri-State Dam derived from appropriations along the mainstem and, thus, Nebraska has enforceable rights in those return flows. *See* Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion (Mar. 1, 1991).

Wyoming has moved for summary judgment to the effect that: (1) The Laramie River was fully apportioned between Colorado and Wyoming in *Wyoming v. Colorado*, and Wyoming has unrestricted use of the Laramie River as against Nebraska, and the Decree does not apportion Laramie flows to Nebraska; (2) the proposed Deer Creek Project would not violate Nebraska's apportionment under the Decree and partial summary judgment should confirm that Deer Creek qualifies as an exempt municipal use under paragraph X of the Decree; and (3) with respect to Tri-State issues, Nebraska's apportionment is limited by the Decree to specifically determined upstream canal rights. *See* Wyoming Second Motion For Summary Judgment And Brief In Support (Feb. 22, 1991).

Colorado has also asked for partial summary judgment that Nebraska is not entitled to assert claims for uses that do not divert at or above Tri-State Dam in an action to enforce the Decree. *See* Colorado's Motion For Partial Summary Judgment (Feb. 25, 1991).

The United States has moved for summary judgment that Wyoming may not contest the legal validity of the water rights of the Interstate Canal to divert and the Guernsey and Glendo reservoirs to store temporarily for the Inland Lakes with a priority date of December 6, 1904. *See* United States Motion For Summary Judgment On The Inland Lakes (Mar. 14, 1991).

This Second Interim Report addresses my disposition of the various summary judgment motions and intervention motions.

C. Summary Judgment Standards

The majority of the issues I consider in this Report arise in the context of motions for summary judgment. Before turning to discussion and analysis of the substantive issues, therefore, it is appropriate to set forth the summary judgment rule and how it has guided my considerations and decisions here.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although Rule 56 is a useful guide, its application must be tempered in an original jurisdiction case such as this. The Federal Rules of Civil Procedure are not applied inflexibly in original actions, but govern where they are deemed appropriate. S. Ct. R. 17.2. Furthermore, as I noted in my First Interim Report (at 18) and my Tenth Memorandum (at 16-18),[15] the Court had already reviewed the factual adequacy of Nebraska's case before it referred the action to me as Special Master, and, therefore, I have inferred that the Court has preliminarily determined that there are factual issues in dispute.

With these considerations in mind, I examine the summary judgment standards recently spelled out by the Court. "The inquiry performed is the threshold one of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[A] party seeking summary judgment always bears the initial responsibility of in-

[15] Tenth Memorandum of Special Master (Mar. 2, 1989) ("Tenth Memorandum").

forming the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In considering the motion, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby*, 477 U.S. at 255. But these inferences do not relieve the nonmoving party of its own burden when opposing summary judgment. Rule 56 requires the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. Factual issues must be resolved in favor of the nonmoving party, and a motion for summary judgment denied, only "where the facts specifically averred by that party contradict facts specifically averred by the movant." *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3188 (1990).

The "facts" involved must be material facts. The materiality of a given fact will be determined by the substantive law involved. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Liberty Lobby*, 477 U.S. at 248. In this original jurisdiction proceeding, the material facts consist, for several of the issues raised, of the facts determined and set forth in the Record[16] and opinions in the original (and related) proceedings, and the conduct of the parties since the entry of the Decree. Where this is the case, the facts are largely undisputed.

[16] The "Record" referred to here and throughout this Report is the transcript of the hearings, exhibits and other documents generated in the course of the original proceedings.

Applying these standards to the issues presented here (as more fully explained below), I find that there are no material facts in dispute (1) concerning the Inland Lakes priority and (2) on the absence of diversion ceilings for the canals in the pivotal reach upstream of Tri-State Dam. I am therefore recommending that the Court grant summary judgment as requested by Nebraska and the United States on those issues. There are also no factual disputes over the Laramie issues, but the undisputed facts provide no basis on which to grant judgment in the form requested by either party and, hence, I recommend that the Court deny all motions on Laramie issues.

Finally, I find that there do remain disputes of material fact, precluding summary judgment, on the Deer Creek and the other below Tri-State issues. In these latter instances, where the facts do appear to be in dispute, I conduct the further inquiry required under Rule 56: whether the evidence presented as showing a need for trial would be sufficient to establish an essential element of the nonmovant's claim. For "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252. Thus, consideration of a summary judgment motion when the facts are disputed "necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." *Id.*

The parties differ on the appropriate substantive evidentiary standards and corresponding burden of proof. Wyoming insists that the "clear and convincing evidence" standard, invoked in many interstate water rights cases within the Court's original jurisdiction, applies here. Wyoming Second Motion For Summary Judgment And Brief In Support (Feb. 22, 1991) ("Wyoming Brief") at 91, 100-01. Nebraska, on the other hand, points out that while this standard is properly used in actions for equitable apportionment, it should not apply here because this proceeding entails enforcement of a prior equitable apportionment (the Decree), not whether there should be an

apportionment.[17] Instead, in Nebraska's view, the nonmoving party need only present "sufficient evidence to establish the existence of essential elements of a claim." Nebraska Response at 66.

None of the motions before me, however, properly presents the question of what standard applies. As recounted in detail in the sections that follow, where the facts are disputed the nonmoving party's evidence clearly meets even the most stringent civil standard in establishing the essential elements of the claim involved or, as the case may be, in contradicting the moving party's factual claims. Nonetheless, I conclude that the clear and convincing evidence standard is inapplicable to the issues in these proceedings. The Court requires states to bear a heavier burden than the usual civil litigant only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). Here, the interference has already occurred by the entry of the Decree. *Cf. Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

D. Substantive Bases for Decision

In ruling on the pending summary judgment motions, my primary task is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions. It is appropriate, therefore, to explain how I have approached this task.

To begin with, I have regarded the plain language of the Decree as controlling when the Decree's meaning is clear and unambiguous. For example, some Deer Creek issues may be resolved partly by a plain reading of paragraph X of the Decree, which provides that "or-

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[17] Nebraska's Response To Wyoming's And Colorado's Motions For Summary Judgment And Basin Electric's Memorandum In Support Thereof (Apr. 25, 1991) ("Nebraska Response") at 65 n.30.

dinary and usual" municipal uses and consumption of water in Colorado and Wyoming are neither affected nor restricted by the Decree. The issues that remain with respect to the exemption, therefore, are those involving the extent to which Wyoming's proposed Deer Creek Project qualifies as a municipal use, the effect of any non-municipal uses on the delicate balance of the river, and whether its anticipated operation and water rights administration impacts will comport with equitable apportionment principles.

I have found it necessary, in dealing with some issues, to probe beyond the Decree's language. When that has been required, I have turned to a number of primary sources to determine what the Decree means. These sources include the Court's 1945 Opinion, the Report of Special Master Doherty and the voluminous Record of the decade of proceedings before the Special Master in the original proceedings.[18] I have found these materials a reliable guide to interpreting the Decree.[19]

In addition, on some issues I have given weight to the course of conduct of the parties in living with the Decree and in its administration after 1945. Although it could be posited that parties constrained by a Decree cannot contribute to divining the Court's intent, two independent considerations justify some reliance on post-Decree ac-

[18] The parties collaborated to produce and make available the more than 30,000-page Record. This task proved particularly difficult when it was discovered that the original Record could not be scanned electronically or otherwise reproduced except by manual retyping. The retyped Record is electronically searchable and has been used extensively by the parties as well as by me and my assistants in preparing the case.

[19] I find these materials more dependable, for example, than is legislative history to the interpretation of statutes. The manner of their creation in the course of the adversary process eliminates risks inherent in the legislative process where materials are unconstrained by rules of evidence and are introduced occasionally with no purpose other than to promote a particular interpretation.

tions. First, at the end of the original proceedings, Special Master Doherty sponsored a process for fashioning the Decree's language by consensus, and much of that language emanates from that collaborative effort. Thus, it is appropriate to consider the conduct of the parties as evidence of the practical construction of the Decree, drawing on well-established principles of contract interpretation. *See* Restatement (Second) of Contracts § 202 (1981). Second, and more important, equitable principles weigh strongly in favor of respecting the reliance of the parties and water users in all three states on long-standing water administration practices and resulting equities under the Decree.

I have also relied on the body of equitable apportionment jurisprudence set forth in the opinions of the Court dealing with other interstate water disputes. In the course of considering that jurisprudence, I have taken appropriate account of the equitable nature of the proceedings and of the equitable considerations presented by the parties and the *amici*. For example, I respect principles of equitable estoppel in my ruling on the Inland Lakes issue. The long history of the administration of the Inland Lakes based on a 1904 priority water right, and Wyoming's participation in the original proceedings, which assumed that the pattern would continue, must be taken into account. Wyoming cannot equitably now be heard to deny that the Bureau of Reclamation has a valid 1904 Wyoming appropriative water right to divert non-irrigation season flows for storage in the Inland Lakes and subsequent release to Nebraska's irrigators during the ensuing irrigation season.

Finally, I have relied heavily on principles of western prior appropriation law. Those principles of first-in-time, first-in-right, have long been followed by Colorado, Wyoming and Nebraska, and they guided the Court's initial fashioning of the Decree in 1945. The Court took into account the numerous factors appropriate to consider

in equitable apportionment cases, but observed that "[p]riority of appropriation is the guiding principle." 325 U.S. at 618. Thus, the Decree ordered the states to respect certain relative priorities across state lines in a manner consistent with their administration of intrastate priorities.

E. Disposition of Legal Issues

1. *Inland Lakes*

With respect to the Inland Lakes, in her petition Nebraska alleges that Wyoming is attempting to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska." [20] Nebraska has moved for summary judgment that the Inland Lakes have a priority date of December 6, 1904 for that storage. The United States seeks similar relief, requesting judgment that the Interstate Canal has a priority of that date to divert North Platte waters for Inland Lakes storage and that the Guernsey and Glendo reservoirs have the right to store the water temporarily for the Inland Lakes. In response, Wyoming seeks judgment that the Inland Lakes do not have a storage right under state law or the Decree.

On this issue, I recommend that the Court grant the respective summary judgment motions of Nebraska and the United States, ruling that the Inland Lakes have the same December 6, 1904, priority date as the other initial elements of the North Platte Project including the Pathfinder Reservoir and the Interstate Canal. I therefore also recommend that the Court deny Wyoming's motion for partial summary judgment.

[20] Nebraska Petition at 3-4.

2. *The Laramie River*

Both Nebraska and Wyoming have moved for summary judgment with respect to the Laramie River. Wyoming argues in essence that, under the Court's 1922 Laramie River Decree and the 1945 North Platte River Decree, she may dewater Laramie flows up to the confluence of the Laramie and North Platte Rivers. Nebraska, on the other hand, seeks a ruling that she has an apportionment of Laramie flows. In her petition, Nebraska alleges that Wyoming unlawfully is depleting North Platte flows through her intended administration and operation of releases from the Grayrocks Dam and Reservoir on the Laramie River, and her intended construction of the Corn Creek Project for additional storage facilities and related pumping and diversion facilities at the confluence of the Laramie and North Platte Rivers.[21] During the years since 1986, Nebraska's stance has evolved, and she now claims that Grayrocks operations will not harm her apportionment if Wyoming allows them to proceed in accordance with a 1978 Settlement Agreement that is discussed later in this report.

I recommend that the Court deny summary judgment to both Nebraska and Wyoming. I find, simply, that historic Laramie contributions to the North Platte were counted in the Decree, and so they still are, despite the fact that the Laramie, like the North Platte, was overappropriated in 1945 and remains so today.

Nebraska fears that two Wyoming projects on the Laramie—Grayrocks Dam and the proposed Corn Creek project—may injure her. I conclude that the Grayrocks issue currently does not pose a tangible threat to Nebraska's or the United States' rights under the 1978 Settlement Agreement or to apportionments under the Decree. I recommend that the Court provide that relief be made available at the foot of the Decree if this changes.

[21] Nebraska Petition at 3.

I shall hold a status conference to determine whether trial is necessary on Corn Creek issues.

3. *Deer Creek*

Nebraska has also alleged that Wyoming unlawfully will deplete North Platte flows through the proposed construction and operation of a storage reservoir—to serve allegedly municipal uses—on Deer Creek, a tributary entering the North Platte River between the Pathfinder and Guernsey Reservoirs. Nebraska Petition at 3. Wyoming has moved for summary judgment that the development of Deer Creek will not violate Nebraska's apportionment and in any event is exempt under the Decree's exemption for "ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree ¶ X.

I recommend that the Court deny Wyoming's motion because material factual issues remain as to how Deer Creek actually will be operated and thus whether it might "disturb the delicate balance of the river," 325 U.S. at 625, or, alternatively, whether and to what extent it is an exempt municipal use under the Decree that will be operated and administered in a manner consonant with interstate equities.

4. *Below Tri-State Dam Issues*

The Decree did not apportion to Nebraska in 1945 any North Platte waters for canals diverting below Tri-State Dam because the Court concluded that lands east of Tri-State could be satisfied from local supplies, including North Platte Project return flows. 325 U.S. at 596; *see also id.* at 607, 654-55. Nebraska has moved for summary judgment that such return flows were part of the "regimen of the river" contemplated by the Decree in which she has enforceable legal rights. Wyoming and Colorado, conversely, have each moved for a summary ruling that Nebraska has no interests protected by the Decree in return or other flows below Tri-State independent of her upstream apportionment for lands served by canals diverting at and above Tri-State Dam.

For the most part, I recommend that the Court deny the motions for summary judgment on the below Tri-State issues as premature because they lack an evidentiary record identifying either downstream of Tri-State injury or causes of any such alleged injury. I recommend that the Court grant partial summary judgment in favor of Nebraska and against Wyoming, however, that the beneficial use requirements determined in the original proceedings for the canals diverting between Whalen and the Tri-State Dam are not absolute ceilings for Nebraska's diversions on a canal-by-canal basis.

5. *Intervention Motions*

Three *amici*—the Platte River Trust, Audubon and Central—repetitioned to intervene following my invitation to them to consider doing so during the June, 1991, hearing. Because none of these *amici* has carried its burden of demonstrating changed circumstances since my initial denial of intervention in 1989, I recommend that the Court deny all three motions but invite the *amici's* continued active participation in these proceedings.

II. THE INLAND LAKES

The Inland Lakes are four off-channel reservoirs in Nebraska constructed early in the century as part of the United States Bureau of Reclamation's ("Bureau") large North Platte Project. These reservoirs receive water through another project element, the Interstate Canal, which diverts from the North Platte at the Whalen Dam in Wyoming to make project deliveries to lands north of the river, both in Wyoming and far into Nebraska. From the time the North Platte Project commenced operations in 1913, it has been the Bureau's practice to divert water for storage in the Inland Lakes during the non-irrigation months of October, November, and April to reduce the

irrigation season demands of the Nebraska lands that are served by the Interstate Canal.

At the time the North Platte Project was initiated, the Bureau applied for and obtained Wyoming state water permits with a priority date of December 6, 1904 for the large upstream Pathfinder Reservoir, the Interstate Canal, and other project canals.[22] Apparently no Wyoming permit was issued that specifically mentioned the Bureau's contemplated non-irrigation season diversions through the Interstate Canal for storage in the Inland Lakes. It is the absence of such a specific permit that has enabled Wyoming to draw into question the Bureau's right to continue the long-standing practice of diverting and storing non-irrigation season flows in the Inland Lakes based on the December 6, 1904 priority.

In 1986, Wyoming brought suit against the Bureau in Wyoming state court ("Christopulos Suit") to require the Bureau to obtain permits under Wyoming law for the diversion and storage of waters in the Inland Lakes during the non-irrigation season.[23] In a clear

[22] In an opinion rendered early in the original proceedings, the Court denied Wyoming's motion to dismiss on the ground that the Secretary of the Interior was a necessary party. The Court noted that the Secretary and his agents had obtained project permits from the state and concluded that an adjudication necessarily would bind him and that consequently "Wyoming will stand in judgment for him as for any other appropriator in that state." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Later, however, the United States determined it should participate in the case and was granted leave by the Court to intervene. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

[23] The United States removed the Christopulos Suit to federal district court. The federal court stayed the lawsuit pending resolution of related issues in this case. *Wyoming ex rel. Christopulos v. United States*, No. C86-0370-B (D. Wyo. Oct. 3, 1986). *See* Appendix To Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States ("Wyoming Appendix") at C-265 to C-271. In 1990, the federal district court dismissed the suit without prejudice. Order of Dismissal Without Prejudice (Aug. 31, 1990), Wyoming Appendix at C-272 to C-273.

reference to the Christopulos Suit, Nebraska alleged in her 1986 petition that Wyoming state officials were taking certain actions designed to prevent federal officials from diverting natural flow from the North Platte for storage in the Inland Lakes.[24]

In her first motion for summary judgment, Wyoming urged that the Court rule "as a matter of law that the Wyoming lawsuit does not violate the Decree."[25] I reformulated the issue presented. The question was not whether the lawsuit itself would violate the Decree but rather whether its possible outcome would violate the Decree.[26] Having found that the Inland Lakes issues are "inextricably entwined with the 1945 Decree," I denied Wyoming's first motion and concluded that the parties should develop the relevant evidence and litigate the Inland Lakes issue in these proceedings rather than in the Wyoming federal district court. Tenth Memorandum at 23.

In the current round of summary judgment motions, both Nebraska and the United States have filed motions for summary judgment on the Inland Lakes.[27] Nebraska

[24] Nebraska was not a party to the Christopulos Suit.

[25] Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion (Sept. 11, 1987) at 103; *see also id.* at 98-99.

[26] In my First Interim Report, I framed the issue as follows:

> [W]hether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, and, if so, whether the Christopulos Suit is an attempt to circumvent the Court's apportionment in the 1945 Decree through the authority of a lower court decree to which Nebraska is not a party.

First Interim Report at 19-20.

[27] Nebraska's Motion For Partial Summary Judgment And Brief In Support of Motion (Mar. 1, 1991) ("Nebraska Brief") at 1, 73-74; Brief In Support Of United States Motion For Summary Judgment On The Inland Lakes (Mar. 5, 1991) ("United States Brief") at 1-3.

seeks a ruling that the right of the Inland Lakes to store 46,000 acre-feet of natural flow during October, November, and April with a priority of December 6, 1904, is part of Nebraska's apportionment; Nebraska also asks me to rule that this question was litigated during the original proceedings and is therefore *res judicata*. The United States' motion is only slightly different. The United States asks for judgment that Wyoming is barred from challenging the December 6, 1904, priority right of the Interstate Canal to divert natural flow from the North Platte for storage in the Inland Lakes or to store the water temporarily in the Guernsey or Glendo reservoirs before transfer to the Inland Lakes. Although the Christopulos Suit is not currently a live controversy, Nebraska requests equitable relief that would preclude Wyoming from taking any future action to interfere with the continuation of historic Inland Lakes storage practices. Nebraska Brief at 73. Wyoming opposes the motions of Nebraska and the United States and asks instead for partial summary judgment confirming that the Inland Lakes have no storage priority under her state law or under the Decree.[28]

I recommend that the Court grant both the Nebraska and the United States motions and rule that the Inland Lakes have a December 6, 1904 priority date. This ruling would bar Wyoming from any action that is inconsistent with a 1904 priority. I also recommend that the Court deny Wyoming's motion on this issue. I observed in my First Interim Report that, on the state of the evidence at that time, Wyoming faced a "daunting burden" in overcoming the position of the United States and Nebraska

[28] Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States (Apr. 26, 1991) ("Wyoming Response") at 104-05. Wyoming also requests rulings on subsidiary matters that I have determined are unnecessary to the resolution of the fundamental legal issue posed.

that the Inland Lakes enjoy a 1904 priority right.[29] First Interim Report at 21. Upon consideration of the arguments and evidence subsequently presented by the parties, I conclude that Wyoming has failed to meet her burden.

A. History of the Inland Lakes

The North Platte Project and the historic operations of the Inland Lakes are described in my Tenth Memorandum to the parties and in Appendix A to my First Interim Report.[30] Nonetheless, I will reiterate some of this history for it forms the basis for my ruling on the present motions.

The North Platte Project, authorized shortly after passage of the 1902 Reclamation Act, provides irrigation water to extensive land areas in southeastern Wyoming and western Nebraska. Major project components include the Pathfinder Reservoir in Wyoming (upriver from the town of Casper), with a capacity of 1,016,507 acre feet, and the Whalen Diversion Dam, which diverts water into two canals: the Fort Laramie Canal on the south side of the North Platte River and the Interstate Canal on the north side supplying water to the Pathfinder Irrigation District during the irrigation season and to the Inland Lakes for storage in the non-irrigation season.

[29] In 1988, during oral argument, the United States moved for summary judgment on the Inland Lakes issue but did not brief its motion. I delayed consideration of the motion because Wyoming had not then had a full opportunity to present evidence on the issue. *See* Tenth Memorandum at 35.

[30] Tenth Memorandum at 25-27. The Doherty Report, the Opinion of the Supreme Court, and the First Affidavit of David G. Wilde dated August 15, 1988 ("First Wilde Affidavit") also detail the history and operations of the North Platte Project. *See* Doherty Report at 30-32; 325 U.S. at 594-56; First Wilde Affidavit ¶¶ 5-43, attached to Response Of The United States To Wyoming's Motion For Summary Judgment ("United States Response") (Aug. 22, 1988).

The Inland Lakes—Lake Alice, Little Lake Alice, Lake Minatare and Lake Winters Creek—are four off-channel reservoirs in Nebraska supplied by the Interstate Canal. They have a combined storage capacity of about 75,000 acre feet. To this day, and "[s]ince April 1913, the natural flow of the North Platte River has been diverted through the Interstate Canal during the non-irrigation season to the Inland Lakes for later use." First Wilde Affidavit ¶ 19; *see also id.* ¶¶ 5-9. Because of icing conditions, the Interstate Canal does not always operate during the winter months. Accordingly—and by agreement of Nebraska, Wyoming, and the United States—water destined for the Inland Lakes is often temporarily stored in Guernsey Reservoir and, as of 1960, in Glendo Reservoir, for release to the Inland Lakes during March, April, or May.[31]

On December 6, 1904, the United States filed applications in Wyoming for the construction and operation of Pathfinder Reservoir and the Interstate Canal. First Wilde Affidavit ¶¶ 15-16 & Exhibits 3, 4.[32] These applications, deemed by the Supreme Court to have been accepted by state officials as adequate under state law,[33] fixed a priority date of December 6, 1904 for both Pathfinder Reservoir[34] and the Interstate Canal.[35]

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[31] Affidavit of Stanley M. Christensen (Mar. 1, 1991) ("Christensen Affidavit") ¶ 6, attached to Nebraska Brief.

[32] Bureau of Reclamation records reflect that a General Statement was attached to these original applications describing the North Platte project elements and making clear that water could be either diverted directly or stored. The General Statement also announced an intention to build several small reservoirs along the lines of the canals for storage to meet seasonal demands. *See* note 41 *infra*.

[33] 325 U.S. at 613.

[34] *Id.* at 602, 649; First Wilde Affidavit ¶ 16.

[35] 325 U.S. at 649; Doherty Report at 204; First Wilde Affidavit ¶¶ 8, 15.

During the early years of the North Platte Project's operation, Wyoming did voice some concern over the Inland Lakes' storage of water without the appropriate Wyoming storage permits.[36] Wyoming, however, has never disputed that the Inland Lakes form an essential component of the North Platte Project.[37] Indeed, in a summary of the status of the Interstate Canal system operation written in 1934, the Wyoming State Engineer reiterated Wyoming's concern that the Inland Lakes lacked individual state permits, but conceded that if the Inland Lakes could be shown to be "an integral part of the original plan filed December 6, 1904," they would have to be accorded a 1904 priority date. Edwin W. Burritt, *Water Supply Report Casper-Alcova Project, Wyo.* (Dec. 31, 1934) at 33, 37-38, Nebraska Appendices at A-62 to A-65.[38] This status was acknowledged during the

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[36] Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States (Apr. 26, 1991) at 49-61; *see also* Nebraska Brief at 75-78.

[37] *See, e.g.*, Answer Of Wyoming To Colorado Cross-Bill at 7; Wyoming Proof Of Appropriation (June 28, 1934) ("Answer"), Appendices To Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion ("Nebraska Appendices") at A-40 to A-42; Preliminary Draft Of North Platte River Compact For Consideration Of Commissioners (Jan. 4, 1927), Nebraska Appendices at A-50 to A-54.

[38] Burritt wrote:

> The Casper-Alcova Project, when constructed [with a 1904 priority date as Wyoming was then claiming], would be neither better off nor worse than the 58,000 acre feet enlargement of the Pathfinder Reservoir, the storage right in Lake Alice and Lake Minatare and the direct flow right of the Fort Laramie Canal, as the establishment of these claims also must depend in their entirety upon the one point, that is, that each of them is an integral part of the original plan filed December 6, 1904, in the office of the State Engineer of Wyoming and protected by inclusion in the general statement concerning the North Platte Project.

Nebraska Appendices at A-65.

original proceedings by both the Court and the Special Master. *See* 325 U.S. at 594-95; Doherty Report at 30.

1. *The Original Proceedings*

The use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings. *See, e.g.*, Record at 208, 480-81, 26151-53, 26227-28, 26760-83. Despite Wyoming previously having made known to the United States that the Inland Lakes were not individually permitted, she did not assert any such concern during the original proceedings.[39] To the contrary, at that time both Wyoming and Colorado urged that storage of natural flows in the Inland Lakes during the non-irrigation season could serve to reduce the flow requirements of the Interstate Canal during the high-demand irrigation season. Record at 26755-83. Both states, therefore, recommended essentially that the entire capacity of the Inland Lakes (75,000 acre feet) be allocated and that Nebraska's allotment of natural flows during the irrigation season be correspondingly reduced. Doherty Report at 60-61; 325 U.S. at 646. While Special Master Doherty and the Court ultimately rejected the storage quantity advocated by Wyoming and Colorado, both nonetheless embraced the concept that some quantity of natural flow water would be stored in the Inland Lakes during the non-irrigation season. Those natural flow diversions could then be deducted to determine the overall Interstate Canal irrigation season requirement.

The Master recommended that 46,000 acre feet be charged against the Inland Lakes and correspondingly deducted. He stated:

> During the months of October, November, and April, the Interstate Canal diverts at Whalen and transports to the inland reservoirs in Nebraska—Lake Alice and Minatare—variable quantities of water which are released in the following irrigation season for use on the lands of the Pathfinder Irrigation District. *Such storage water reduces the irrigation season demand of the canal on the river at Whalen.* . . . My conclusion is that 46,000 acre feet should be adopted as the charge against the Interstate seasonal requirement for water storable in Lake Alice and Minatare. *This deducted from the total Interstate requirement* of 419,000 acre feet leaves a net seasonal requirement of that canal at Whalen of 373,000 acre feet, and reduces the total net seasonal requirement of all canals diverting in the Whalen-Tri-State Dam section to 1,027,000 acre feet.

Doherty Report at 60-61 (emphasis added, footnote omitted).[40] Further, Special Master Doherty recommended that, "[s]hould it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertable to Alice and Minatare, the seasonal demand on the river of Interstate should be accordingly reduced." *Id.* at 61 n.3.[41]

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[39] *Cf.* Record at 20417-23, 21345-47, 21475, 26228-30, 27846-47, 28598-99, 29414, 29447-48; *see also* United States Exhibit No. 132, Nebraska Appendices at A-68; Wyoming Exhibit No. 160, Nebraska Appendices at A-70 to A-71.

[40] In calculating the Interstate Canal's demand during 1931-40, Special Master Doherty emphasized that his calculation included flows to the Alice and Minatare reservoirs. Doherty Report at 76, Table VII. Moreover, despite the fact that the Record contains obvious inconsistencies in the basic descriptions of the Inland Lakes (*compare* U.S. Exhibit 132 (listing three lakes with Minatare constructed in 1915) *with* Doherty Report at 30 (two lakes, Minatare completed in 1914)), these inconsistencies were not examined seriously by the parties or Special Master Doherty, lending additional support to the conclusion that the sole Inland Lakes issue considered was the extent of their putative supply to the overall North Platte Project scheme. Because the focus was on overall supply and storage, it was apparently not deemed relevant whether the Lakes were individually permitted.

[41] *See also* "General Statement" at 1, regarding the North Platte project components, attached to First Wilde Affidavit ("It is proposed to store all the unappropriated waters of the North Platte River, and application is made for all such unappropriated water,

Adopting Special Master Doherty's recommendations, the Court agreed that the Inland Lakes formed an essential component of the North Platte Project. 325 U.S. at 595. The Court also agreed that natural flow diversions into the Inland Lakes during the non-irrigation season should be deducted from Nebraska's irrigation season Interstate Canal natural flow apportionment, the approach advocated by Wyoming and Colorado. *Id.* at 646. Finally, the Court recognized a December 6, 1904 water right priority for the North Platte Project, implicitly according the same priority to the Inland Lakes as was accorded to Pathfinder Reservoir, the Interstate Canal, and the other initial project elements.[42] *Id.* at 613, 648-49 & n.2; *see also* Doherty Report at 86-87.

2. *After the Decree*

Since the Decree was entered in 1945, the Inland Lakes have been administered on the same priority basis as Pathfinder Reservoir and the Interstate Canal for up to 46,000 acre feet during October, November and April.[43]

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which, however, may be taken direct from the river at the headgates of any of the canals constructed by the Government of the United States . . . or may be stored, as appears to the best interests and of the greatest benefit to said reservoir canals and the users of water thereunder."); *id.* at 2 ("It is expected to construct numerous small reservoirs along the lines of the several canals, in order to meet the demand for large amounts of water during the short period of maximum use. These reservoirs have not been definitely located."). Bureau of Reclamation records reflect that this Statement was filed with the original permit application to the Wyoming State Engineer.

[42] This status is not inconsistent with that of the Guernsey Reservoir, which is also part of the North Platte Project but has a 1923 priority. The Guernsey Reservoir was not included in the original applications filed in 1904, and construction of the Dam did not begin until 1925. By contrast, the Inland Lakes were included in the initial design of the North Platte Project. *See* First Wilde Affidavit ¶¶ 7-8, 16-19.

[43] *Id.* ¶¶ 28-29 & Exhibits 11-14; *see also* North Platte Storage Ownership Accounting Statement, attachment to letter from James

There is some evidence that, beginning in 1959, Wyoming reasserted her argument that the Inland Lakes lacked individual state permits. *See* Wyoming Response at 75-77. Nevertheless, even after 1953, with Glendo Reservoir newly on line, Wyoming did nothing to limit the continuing project operations of the Inland Lakes based on a December 6, 1904 priority. *See* Nebraska Brief at 83.

It was not until the annual planning meeting for the North Platte operations in April of 1985, shortly before she filed the Christopulos Suit, that Wyoming for the first time affirmatively requested that the historic storage and accounting procedures for the Inland Lakes be changed. Wyoming would thereby have shifted the Inland Lakes to last in priority on the river behind the priorities of Guernsey and Glendo Reservoirs. First Wilde Affidavit ¶ 30; *see also* Nebraska Brief at 84.[44] Then, in 1986, Wyoming sought to achieve this junior Inland Lakes priority by filing the Christopulos Suit.

L. Ogilvie to Earl Lloyd and Dan S. Jones, Jr. (Apr. 22, 1960), Nebraska Appendices at A-105 to A-110. The published reports of the North Platte Storage Ownership Accounting procedure statements up to 1984 show that the historic filling patterns for the Inland Lakes were as mandated by Special Master Doherty in his Report. *See, e.g.*, North Platte Storage Ownership Accounting Statement (Oct. 1, 1970), Nebraska Appendices at A-196 ("It is assumed that the river gains below Alcova during the months of October, November, and April will accrue to [the Inland Lakes], up to a total of 46,000 acre-feet and at a rate not to exceed 910 second-feet."). This assumption that only gains downstream of Alcova (a short distance downstream of Pathfinder Dam) would reach the Inland Lakes was grounded on the fact that the Pathfinder Dam captured virtually all upriver accretions during the non-irrigation season.

[44] At about the time this position was taken, Wyoming was involved in preparing environmental documentation for the proposed Deer Creek project that reflected an additional 50% annual yield for project users if the Wyoming Deer Creek priority could be established as senior to the Inland Lakes. Final Environmental Impact Statement for Regulatory Permits: Deer Creek Dam and Reservoir (Wyoming, Sept. 1987) ("Deer Creek FEIS") at vii. *See infra* note 104.

B. Wyoming's Evidence

Wyoming makes three basic arguments to support her motion for partial summary judgment and to counter the evidence compiled by Nebraska and the United States. First, Wyoming maintains that the Inland Lakes have no valid water rights priority under her state law. Wyoming's case rests heavily upon this contention, and the bulk of her efforts have been directed at proving that no individual permit applications were filed for Inland Lakes storage and that Wyoming has raised this point with the United States over the years. Wyoming Response at 45-90. As proof, Wyoming has offered correspondence showing that Wyoming state officials have called to the attention of the United States[45] the absence of an official, separate storage permit for the Inland Lakes under Wyoming law.[46] *See* Wyoming Response at 49-61.

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[45] The United States does not concede that the Inland Lakes have no valid water rights under state law. United States Reply To Wyoming's Response To Motion For Summary Judgment On The Inland Lakes (May 24, 1991) ("United States Reply") at 4 & n.9. The United States acknowledges that the Inland Lakes priority may not have been obtained by the "traditional route" but stresses that the interstate nature of the Inland Lakes operation and their functional significance to the overall North Platte Project made such routes unsuitable. *Id.* at 4 n.11, 9-10 & n.24; *see also* Nebraska Reply To Wyoming's, Colorado's, The United States', And Basin Electric's Responses To Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion (May 23, 1991) ("Nebraska Reply") at 3 ("Nebraska further believes that valid permits for the Inland Lakes exist in both states.").

[46] Wyoming points to the following documents: Eleventh Biennial Report Of The State Engineer To The Governor Of Wyoming, 1911-1912 at 46, Nebraska Appendices at A-33; Letter from A.J. Parshall, Wyoming State Engineer, to Andrew Weiss, North Platte Project Engineer (May 2, 1914), Wyoming Appendix at C-71; Report On History Of Water Rights, North Platte Project, by Brooks Fullerton, District Counsel (Oct. 31, 1925), Wyoming Appendix at C-98; Memorandum by W.J. Burke, District Counsel (Sept. 2, 1932) at 71-72, 100, Wyoming Appendix at C-117 to C-119.

Wyoming's second argument rests on negative implication and absence of evidence. She notes that the Court, in the original proceedings, did not explicitly adjudicate the priority rights of the Inland Lakes. This omission, according to Wyoming, establishes that no such priority right exists. *Id.* at 90, 94-97. Wyoming points out that the Supreme Court omitted any specific reference to the Inland Lakes in paragraph III of the Decree, which sets forth the relative priorities of the Pathfinder and Guernsey Reservoirs of the North Platte Project and the Seminoe and Alcova Reservoirs of the subsequent Kendrick Project, which serves only Wyoming lands. This omission allegedly was repeated in 1953 when the Court amended the Decree to deal with the then-proposed Glendo Reservoir. *Id.* at 94-95. In Wyoming's view, too, the Inland Lakes can have no meaningful priority right because nowhere is there specified the ordinary administrative elements of water rights such as point of diversion, diversion rate and nature of use.[47]

Finally, Wyoming contends that the scheme of storing natural flow waters in the Inland Lakes resulted from ad hoc, year-to-year agreements rather than from formal administration of priority storage rights, claiming it was merely an effort "to allow operation of the Inland Lakes to continue despite the lack of a water right specified by state law permit or the Decree." Wyoming Response at 100; *see also id.* at 70, 85, 100. Characterizing the years 1945 through 1986 as a period of "cooperative effort to avoid confrontation on the Inland Lakes dilemma," Wyoming sets forth a history of the Inland Lakes operation which coincides in large part with that presented by Nebraska and the United States. *Id.* at 70-85; *see also* Nebraska Reply at 3. Where Wyoming parts company from Nebraska and the United States is in her repeated

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[47] Wyoming Supplemental Brief Regarding Summary Judgment (July 25, 1991) ("Wyoming Supplemetal Brief") at 2 n.2.

citation to documents and correspondence that fail to refer to a specific Inland Lakes storage right.[48]

C. Discussion and Conclusion

Although Wyoming has made a valiant effort to meet her "daunting burden" to marshall evidence in support of her theories with respect to the Inland Lakes and to challenge the summary judgment motions of Nebraska and the United States, I have determined that her effort is to no avail. In many ways, Wyoming's evidence and the arguments she makes beg the critical question. The issue is not whether Wyoming issued to the Inland Lakes separate, identifiable storage permits. Her facts are not disputed on that score, but they are immaterial to whether the Inland Lakes ultimately enjoy a 1904 priority right.

The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season. Unlike Guernsey Reservoir, these off-river channel reservoirs were an integral component of the North Platte Project from the outset, were part of the original design proposed for the Interstate Canal, and were constructed within the first phase of the North Platte Project contemporaneously with the construction of the Interstate Canal itself. First Wilde Affidavit ¶¶ 7-8, 16-19. The Inland Lakes, as the evidence shows, have been treated throughout the century as having a December 6, 1904 priority. I conclude that the priority date of December 6, 1904, *see* 325 U.S. at 613, 648-49 and n.2, applies to the Inland Lakes as an original and essential element of the design, construction and operation of the Interstate Canal as well as to the temporary storage of water in the Guernsey and Glendo reservoirs.[49]

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[48] *See* Wyoming Response at 71-74, 77 (identifying letters from the United States).

[49] It is noteworthy that the Interstate Canal was sized so that it cannot deliver the total requirements of the lands it serves unless

As the United States concluded in its reply brief, "in an overappropriated river, a water right is only as good as its priority." United States Reply at 8. It is clear that the Special Master recommended and the Court recognized in the Decree a right to store in the Inland Lakes 46,000 acre feet of natural flow during the non-irrigation season to meet Nebraska's apportionment. This amount was counted in the apportionment and used correspondingly to reduce irrigation season natural flow deliveries to the Interstate Canal, making this priority a vital underpinning of the ultimate apportionment. Had the Inland Lakes not been granted this right, the apportionment may well have been different. The Court did not accord an empty right.

The initial North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components. *See, e.g.*, First Wilde Affidavit ¶ 47. This fact alone suffices to defeat Wyoming's motion. Furthermore, without priority protection for the Inland Lakes, the entire apportionment scheme for the North Platte Project could be severely disrupted.[50] I have determined that neither the Special Master nor the Court intended such a disruption to occur.

The administration of the Inland Lakes since the Decree supports this interpretation. Wyoming may have questioned the Inland Lakes' permit status over the years, but she has only recently seriously challenged the Inland Lakes' entitlement.[51] Because of Wyoming's historic ac-

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non-irrigation flows are already in place in the Inland Lakes at the beginning of the irrigation season. Transcript of Summary Judgment Hearing, Pasadena, California (Nov. 11, 1988) at 136-38.

[50] First Wilde Affidavit ¶¶ 44, 45; Table 4, ¶ 47; Table 5, ¶¶ 48-51; Table 6; Table 7, ¶¶ 73-82, 89(c) & (d).

[51] Despite Wyoming's protestations to the contrary, I cannot help but consider that there may indeed be a relationship between Wyoming's posture with respect to Inland Lakes and her proposed Deer Creek Project. *See, e.g.*, Nebraska Reply at 18 n.12; *see also supra* note 44; *infra* note 104.

quiescence, both Nebraska and the United States based their summary judgment motions in part on principles of *res judicata*. While such principles may not have full application in an original jurisdiction proceeding (*cf. Wyoming v. Oklahoma*, 112 S. Ct. 789, 796 (1992)) equitable concerns most certainly do. On that basis alone, I am convinced that the time for Wyoming to have challenged the alleged lack of individual permits for the Inland Lakes was certainly no later than during the original proceedings. Given the history of this case and the many decades of uninterrupted operation of the North Platte Project with the Inland Lakes storing natural flow in October, November and April, equitable considerations do not allow interference with this longstanding practice.

Lack of specific state permits is not fatal to the priority right of the Inland Lakes. Nor do I find persuasive Wyoming's concern about administering the priority rights of the Inland Lakes without the specific administrative elements normally required in state permit applications. Based on my review of the evidence, I find that Wyoming has not identified any problems attributable to the practice of storing in the Inland Lakes during the non-irrigation season. Such problems as may arise in the future can be addressed by the parties or, in default thereof, brought back to the Court.

Even if it were established that errors were made in according the Inland Lakes operations a 1904 priority in the earlier litigation, that determination should not now be set aside. *See Arizona v. California*, 460 U.S. 605, 621, 626 (1983). The Decree was based in part on the historic administration of the North Platte Project as though the Inland Lakes shared a 1904 priority with the initial elements of the North Platte Project including the Interstate Canal. Were such a priority denied and the Inland Lakes made junior to other uses such as Wyoming's proposed Deer Creek project, it would violate

the Supreme Court's admonition in *Nebraska v. Wyoming* that to the extent possible, "established uses should be protected." 325 U.S. at 618. It would be inequitable at this point to tamper with Nebraska's apportionment by altering the priority status of the Inland Lakes.

The foregoing review of the Record demonstrates that there is no issue for trial and that insufficient evidence exists for a factfinder to return a verdict for Wyoming. *See Liberty Lobby*, 477 U.S. at 249. At the same time, Nebraska and the United States have shown the absence of a genuine issue of material fact by demonstrating that the Inland Lakes were always and remain an integral component of the original North Platte project. In sum, I recommend that the Court deny Wyoming's motion for partial summary judgment and grant the motions of Nebraska and the United States. I recommend that the Court rule that the Inland Lakes operations, including the temporary winter storage of Inland Lakes water in the Guernsey and Glendo reservoirs, enjoy the same priority as the other original components of the North Platte Project—December 6, 1904—to store at least 46,000 acre feet of natural flow during October, November, and April.[52] I also recommend that an injunction issue barring any actions by Wyoming inconsistent with that priority.

III. THE LARAMIE RIVER

The controversy over entitlement to Laramie waters grows out of the "polestar" of the Decree, paragraph V.[53]

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[52] The Special Master did not intend the 46,000 acre feet to be an immutable limit. "Should it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertible . . . the seasonal demand on the river of Interstate should be accordingly reduced." Doherty Report at 61 n.3.

[53] The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska

That paragraph apportions during the irrigation season all natural flows in the river section from Guernsey Dam (just above the Whalen Dam) in Wyoming to the Tri-State Diversion Dam (just across the Wyoming-Nebraska state line) in Nebraska, 75 percent to Nebraska and 25 percent to Wyoming. The Laramie River empties into the North Platte in this section and, therefore, the Laramie's actual inflows to the North Platte have been subject to the Decree's apportionment.

Nebraska and Wyoming have taken point-counterpoint positions with respect to their rights in the waters of the Laramie River, and each state seeks summary judgment in her favor. Wyoming claims that by virtue of the Court's 1922 Laramie River Decree in an original action between Wyoming and Colorado,[54] and by virtue of the statement in the 1945 North Platte Decree that the Laramie Decree would remain undisturbed, 325 U.S. at 667, Nebraska's apportionment does not include any rights to Laramie flows. Wyoming maintains, therefore, that, as against Nebraska, she may with impunity dewater the Laramie river to its confluence with the North Platte River.[55]

Nebraska claims, on the other hand, that she is entitled to continue to rely on those Laramie flows that historically have reached the North Platte and that the

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on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska . . .

Decree ¶ V.

[54] *Wyoming v. Colorado*, 259 U.S. 419, *amended*, 260 U.S. 1 (1929), *vacated and new decree entered*, 353 U.S. 953 (1957) ("Laramie Decree").

[55] In her current motion, Wyoming asks that Nebraska's claim respecting Grayrocks and Corn Creek be declared invalid, rather than directly posing the issue as stated in the text—which is how she had stated it in her 1987 motion. The ultimate question is the same, however, for Nebraska's claims could not be deemed summarily invalid unless Wyoming may dewater the Laramie.

Court included the North Platte apportionment in the original proceedings. Nebraska's briefing theory in her motion for summary judgment was that the Supreme Court made a finite apportionment to Nebraska of Laramie flows over and above a defined apportionment to Wyoming to irrigate identified acreage. Nebraska Brief at 91-92. At the hearing on the motions, Nebraska announced a new theory that, during the original proceedings, Wyoming offered to Nebraska downriver reconstructed Laramie flows, which thereby became part of Nebraska's apportionment.[56]

Earlier in the current proceedings, Wyoming moved for summary judgment on the Laramie and other issues. For the reasons set forth in my First Interim Report in 1989, I denied that motion and directed the parties to proceed to trial on the Laramie issues. I did, however, leave open the possibility of later summary adjudication, suggesting to the parties that they pursue the following paths of inquiry: "practical construction of the Decree as it has affected the Laramie, including metering activities, accounting procedures, and recording procedures. . . . [and] additional factual development respecting any Nebraska equities tied to the remaining Laramie flows . . ." First Interim Report at 26-27. These questions derived from my conclusion that the record in the North Platte Decree case fails to reveal a clear interpretation of the Laramie Decree by either Special Master Doherty or the Supreme Court, and that even the 1922 Laramie Decree itself did not address the apportionment of the Laramie beyond what was needed to make an equitable apportionment between the litigating states (which did not include Nebraska). Because the North Platte Decree simply

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[56] Transcript of Proceedings, Salt Lake City, Utah (June 7-8, 1991) ("June 1991 Transcript") at 76; Nebraska's Post-Hearing Brief On Nebraska's, Wyoming's, Colorado's And The United States' Motions For Summary Judgment (July 26, 1991) ("Nebraska's Post-Hearing Brief") at 14 n.7.

acknowledged and respected the Laramie Decree on its face, I directed the parties to focus not only on the history of the two Decrees, but also on the range of equitable considerations pertinent to the apportionment as set forth by the Supreme Court in *Nebraska v. Wyoming*.[57] First Interim Report at 27.

I recommend that the Court deny the motions for summary judgment of both Nebraska and Wyoming. Both states posit that the Laramie issue is susceptible of a crisp resolution. Yet I, like Special Master Doherty, who spent a decade with the original proceedings in this case, find that a crisp result eludes me on the Laramie. Special Master Doherty, by the end of the original proceedings, remained puzzled by the place of the Laramie in the litigation:

> After reviewing the matter I am left in some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . . The other parties appear to take the view that the Laramie is removed from the present case by the decree in *Wyoming v. Colorado*, except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming permitted under the terms of that Decree.

Doherty Report at 270-71.

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[57] In the original proceedings, the Court explained that:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue.

325 U.S. at 618.

In the current proceedings, after reviewing the voluminous filings associated with the cross-motions for summary judgment that are before me, as well as the transcript of the hearings held on June 7 and 8, 1991, I find I cannot discern the respective states' positions during the original proceedings. What also remains murky, however, is the intent of the Court and the Special Master. And despite the states' current protestations, I conclude that the definitive answer that each claims to have found simply does not exist. Neither the Court nor the Special Master made any precise disposition of the disputed flows.

Wyoming has not pointed to specific facts in the Record supporting her dewatering license theory. I therefore have determined that the Decree does not grant the right to Wyoming, after honoring Colorado's apportionment, to dewater the Laramie to its confluence with the North Platte. For it is clear that, notwithstanding the facially persuasive language contained in the Decrees and especially in a 1957 replacement Laramie Decree,[58] all the waters of the Laramie River were not fully and finally apportioned to Colorado and Wyoming either in 1922 or 1945, nor were those waters treated that way at that time or since then.

I also find, based on my review of the earlier cases and the Record, that Special Master Doherty and the Supreme Court in 1945 treated some Laramie flows as part of the North Platte water supplies to the extent that

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[58] *Wyoming v. Colorado*, 353 U.S. 953-54 (1957) (vacating Laramie Decree and entering new decree, stating, *inter alia*, that "[t]he State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after [] diversion and use in Colorado" as specified). Even if this 1957 Decree were relevant to interpreting the 1945 and 1922 Decrees, my conclusions would not change. Whatever rights Nebraska had to Laramie contributions prior to the 1957 Decree would not have been affected by that new Decree to which she was not a party.

those flows were expected to enter the Whalen to Tri-State reach. In the drought conditions that existed at the time of the original proceedings, the over-appropriated Laramie actually was contributing flows to the North Platte's natural flows, and the Court expected some flows to continue to reach the North Platte even in dry years.

On the other hand, I find that Special Master Doherty and the Court did not affirmatively apportion Laramie flows by requiring Wyoming to deliver particular quantities of Laramie waters to the North Platte confluence. Nebraska fails to persuade to the contrary via her earlier theory of a finite apportionment to her, or her later theory that Wyoming was obligated by the Decree to deliver reconstructed flows and route them downstream to the North Platte. Like Wyoming, Nebraska has not shown that the Record supports her contentions.

Indeed, as will be explored more fully below, there is a marked absence of evidence to establish that either party is entitled to the judgment each seeks as a matter of law. As Wyoming correctly observed, the underlying facts are not in dispute. Wyoming Brief at 3. The legal import of these facts is in dispute, but it is not merely a matter of legal interpretation. The facts are not such that judgment can be entered thereon in favor of either party, and it appears that no further material facts exist in the Record. In any event, as a practical matter, granting summary judgment to Wyoming based on her de-watering theory would give her only a phyrric victory. Both the North Platte and the Laramie Rivers continue to be over-appropriated, as they were in 1945. There is a delicate balance in the North Platte Basin that causes new depletions anywhere in the system to have effects elsewhere in the Basin.[59]

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[59] *Cf.* June 1991 Transcript at 50-51 (Ms. P. Weiss); *id.* at 247-48 (Mr. Sievers).

Denial of both motions for summary judgment does not necessarily require the parties to proceed to trial on Laramie issues, however. This is so because the Gray-rocks issue can be resolved during this summary judgment proceeding, leaving only the issue whether at this time the Corn Creek project in the Laramie basin poses any present or imminent threat to Nebraska's apportionment. I shall hear the parties on this issue in a status conference and proceed to trial if appropriate.

A. The Motions for Summary Judgment

1. *Background: The Decrees*

The origins of this dispute lie in a suit filed in 1911 by Wyoming against Colorado and resolved by a Supreme Court decree in 1922. *Wyoming v. Colorado*, 259 U.S. 419, *amended*, 260 U.S. 1 (1922) ("Laramie Decree"). Wyoming sought to prevent Colorado from making transbasin diversions from the upper reaches of the North Platte in Colorado that allegedly would have injured senior Laramie appropriators in Wyoming.

In the Laramie River case, the Supreme Court examined the nature and quantity of Laramie flows, the existing uses of these flows, and their priority dates. Observing that the stream's flow "varies greatly" from one season to the next as well as from year to year, 259 U.S. at 471, the Court determined how much water would be available for use in Wyoming after satisfying senior diversions in Colorado. "It results that, in our opinion, the entire supply available for the proposed Colorado appropriation and the Wyoming appropriations, down to and including the diversions for the Wheatland district, is 288,000 acre-feet." *Id.* at 488; *see also* Doherty Report at 269. Because this supply could not satisfy Wyoming's demands as well as the proposed transbasin diversion, the Court determined relative priorities, concluding that Colorado's proposed project was junior to the priorities of

approximately 181,500 acres of land dependent on Wyoming appropriations. The Court then calculated that:

> [t]he amount of water appropriated and reasonably required for the irrigation of these [Wyoming] lands is 272,500 acre-feet. A much larger amount is claimed, but our finding restricts the amount to what the evidence shows is reasonably required. . . . As the available supply is 288,000 acre-feet, . . . there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado.

259 U.S. at 496.

Accordingly, the Laramie Decree enjoined Colorado "from diverting or taking from the Laramie River and its tributaries in the state of Colorado more than 15,500 acre-feet of water per annum." 260 U.S. 1-2. Although the Court's Opinion speaks of specific water quantities to which Wyoming's senior appropriators were entitled, and apparently only considered water uses down to and through the Wheatland project,[60] the injunctions in the Laramie Decree explicitly curtail only Colorado's uses, not Wyoming's.

A persistent drought during the 1930's led to the original proceedings between Nebraska and Wyoming. As explained earlier, Nebraska brought suit in 1934 to settle each state's (Nebraska, Wyoming and Colorado) equitable share of the North Platte, alleging that the two upstream states' diversions for irrigation were depriving Nebraska's senior appropriators of waters to which they were entitled. *See* 325 U.S. at 591-92. Wyoming and Colorado joined in the request for equitable apportionment, but only Colorado expressly sought to exclude the Laramie (and the South Platte) from the Court's consideration. Thus, in footnote 1 to its Opinion the Court observed:

[60] *E.g.*, 259 U.S. at 488 ("the diversion for the Wheatland district (the lowest diversion we are to consider) . . . .").

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. . . . Those apportionments are in no way affected by the decree in this case.

Id. at 592 n.1.

In the original proceedings, Special Master Doherty examined the geography of the North Platte and its uses, including irrigated acreages and priorities. The Court agreed with the Special Master that "the dependable natural flow of the river during the irrigation season has long been over-appropriated." *Id.* at 608; *see also id.* at 621. Based upon the Special Master's detailed findings, the North Platte Decree generally restricted prospective developments that would interfere with existing uses of North Platte flows and protected established Wyoming and Nebraska uses from certain further upstream developments.

In accordance with the Special Master's findings, the Court also characterized the short, 40-mile Whalen to Tri-State section—the reach where the Laramie empties into the North Platte—as the "pivotal section of the entire river" in which, apart from the Bureau of Reclamation's junior priority Kendrick project, "the demand for water is as great . . . as in the entire preceding 415 miles from North Park to Whalen." *Id.* at 604. The Decree established an apportionment of 75 percent to Nebraska and 25 percent to Wyoming of the natural flow of this section during the irrigation season. As indicated in footnote 3 of the Court's Opinion,[61] this apparently straightforward division was derived from the Special Master's calculations of flows in that reach of the river, figures that were based on diversions, priorities

[61] That footnote simply reproduces figures from the Special Master's Report to the Court. *Compare* 325 U.S. at 593 n.3 *with* Doherty Report at 67 & Table III.

thereof, and sources for the natural flow. One of those sources counted by the Special Master was the Laramie. Notwithstanding this inclusion, which the Court's Opinion does not expressly acknowledge (it merely repeats the Special Master's figures), the North Platte Decree itself states that it does not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." Decree ¶ XII(d), 325 U.S. at 671. This seeming contradiction between a surficial plain-meaning reading of the Opinion and the Decrees (that the North Platte apportionment does not implicate the Laramie apportionment) and the factual basis for the North Platte apportionment (the counting of Laramie flows) requires going beyond the bounds of the Laramie and North Platte Decrees themselves to interpret and apply them.

It is against this backdrop that the current motions for summary judgment are considered.

2. *The Record Through 1945*

a. *The Decrees, Opinions and Special Master Doherty's Report*

I observed earlier that the language of the North Platte and Laramie Decrees and the Doherty Report did not resolve the Laramie issues and I will not revisit that discussion. *See* First Interim Report at 22-27. Each state has nonetheless presented further briefing and factual materials contending that these support judgment in her favor. This additional evidence has not, however, swayed my initial conclusions.

Wyoming contends that, apart from what she deems the conclusive language of the opinions and decrees themselves,[62] further examination of the two Decrees and the

[62] For example, footnote 1 in *Nebraska v. Wyoming* (quoted earlier) could be read as affirming or assuming that the Laramie Decree fully apportioned every drop of the Laramie between Colorado and Wyoming. *See* First Interim Report at 23-26.

Doherty Report confirms that she was allocated all Laramie flows except for Colorado's explicit upstream share of 15,500 acre feet. Looking first at the Laramie Decree, Wyoming argues that a specific apportionment of Laramie flows to her was unnecessary. Because the Laramie was over-appropriated, the Laramie Decree adopted a "dependable supply" formula. This formula, which assumed a certain degree of storage and conservation, entailed determining what flows were "dependable"[63] and then calculating what share of the entirety of these flows Colorado appropriators would receive under strict prior appropriation law.[64] Wyoming claims that this formula depleted what dependable flows there were at that time and that, therefore, there was no need to specify an allocation to her. Wyoming Brief at 5. Furthermore, Wyoming points out that no limitations were needed on her share because the severe water shortages that prompted the litigation in the first place would curb Wyoming's use sufficiently. *Id.* at 9.

Turning to the North Platte Decree, Wyoming finds support in the fact that it imposed various restrictions on Wyoming's uses in other sections of the North Platte Basin to ensure sufficient natural flows for the Whalen to Tri-State reach, but imposed no express limitations on Wyoming's uses of the Laramie. That silence, she maintains, represents an implicit acknowledgement of her rights to all Laramie flows not allocated to Colorado.

Finally, Wyoming points to sections of the Doherty Report where the Special Master arguably would have mentioned or incorporated the Laramie had he intended to apportion any of it to Nebraska or, conversely, to limit Wyoming's uses thereof. For example, in describing the drainage basin of the North Platte, Special Master Doherty omitted a description of the Laramie drainage.

[63] 259 U.S. at 483-84.

[64] *See id.* at 489-90.

Doherty Report at 20. Similarly, he excluded the Laramie Basin when recounting the history and extent of irrigation in the three states. *Id.* at 29.

Nebraska counters two of these arguments. Insisting that she cannot be bound by the Laramie Decree in any event because she was not a party in *Wyoming v. Colorado*, Nebraska also disputes Wyoming's interpretation of the Laramie Decree's "dependable flow" language, arguing instead that it reveals a deliberate decision *not* to apportion the entire flow between Colorado and Wyoming, because it was too variable. Nebraska Brief at 93-94.

As for the absence of restrictions on Wyoming's use of the Laramie in the North Platte Decree, Nebraska points out that no explicit limitations were placed on Wyoming's use of the mainstem of the Whalen to Tri-State section or any sources thereof.[65] Therefore, Nebraska concludes, the lack of restrictions on Wyoming's use of the Laramie has no significance.

Nebraska does not address Master Doherty's failure to include the Laramie in the portions of his Report describing drainage and irrigation in the North Platte Basin. But, as will be explored below, it ultimately matters little whether these exclusions signified a decision not to consider the Laramie issues already covered in the 1922 Decree or simply reflected the use of exhibits that did not include these data.[66]

Nebraska also makes the interesting argument, based on the North Platte Decree, that her entitlement to Laramie River waters is *res judicata* because "the inclusion of Laramie River contributions as well as the calculation of the requirements below Tri-State Dam were necessary in determining the overall supplies and demands [and] directly affected the final apportionment of flows between Wyoming and Nebraska." Nebraska Brief at 65. Under *res judicata*, or more accurately issue preclusion, an issue of fact or law that actually was litigated and determined by a valid and final judgment is conclusive in a subsequent action between the parties. 18 Wright, Miller & Cooper, Jurisdiction § 4421. Here, it is clear that this issue was *not* actually litigated, either as a legal or factual matter. Neither the Decree nor the Doherty Report makes any reference to the question of Nebraska's entitlement to the Laramie.[67] Nothing in the Doherty Report nor the Court's Opinion reflects any consideration, much less final resolution, of this question.

While the quantities of water from each source of the Whalen to Tri-State reach were a part of the total flow available for apportionment of the North Platte's Whalen to Tri-State section, the amount of water in the aggregate is what was important—or, more accurately, the deficiency of the total natural flow in that section. *See* 325 U.S. at 605. The Laramie inflows were not thereby converted into an "essential" factual predicate to the decision. Further, there is no explicit language on this subject in the 1945 Opinion aside from the introduction concerning the sources of water for the North Platte. Rather, the Court focused on storage requirements, requirements of existing appropriators, canal diversions, priorities, and total flows. *Id.* at 638-46. The Special

[65] Nebraska Response at 28.

[66] For example, the table showing drainage area came from a Colorado exhibit, *see* Doherty Report at 20. Colorado never wavered from the position that the Laramie had been completely apportioned and that *no* Laramie waters should be included in any determinations concerning the North Platte. *See, e.g.*, Record at 14390-91 (Counsel for Colorado stating that entire Laramie "has been fully allocated" and that "there isn't any water for Nebraska").

[67] *See* Record at 18624-29. In an exchange among counsel at the hearings in 1939, Nebraska's attorney expressed surprise at the suggestion that his state was bound by the Laramie Decree, "since there were no pleadings filed alleging that." *Id.* at 18624. Soon thereafter, Wyoming asserted that all flows in excess of the amounts mentioned in the Laramie opinion belonged to Wyoming. *Id.* at 18626.

Master devised (and the Court adopted) the method of apportionment based on percentages of daily natural flows. In the absence of any specific language in the Decree itself[68] or findings concerning apportionment of the Laramie, I decline Nebraska's invitation to apply the powerful doctrine of issue preclusion. Preclusive effect cannot be given to an implication of apportionment. The same answer must be given to Wyoming's claim that the facts establish complete apportionment to her.

Yet, I do find it significant that Special Master Doherty expressly included Laramie flows in his tabulation of waters that were available for apportionment in the Whalen to Tri-State section. He mentioned Laramie inflows when discussing tributary contributions to that reach. Doherty Report at 22. He incorporated its flows in his summary of Colorado's and Wyoming's "contributions to the [North Platte] river system by way of original production of water in acre feet and percentages." *Id.* He tabulated contributions of natural and return flows from the Laramie River to the North Platte, as presented in Wyoming Exhibit 170, in determining long-term mean supplies to the reach. *Id.* at 63. He counted Laramie inflows in his analysis of requirements and supplies for the 1931-1940 period in the Whalen to Tri-State section. *Id.* at 67. These instances demonstrate that the Laramie's contributions were considered in the original proceedings, and that fact cannot be ignored.

[68] At the hearing on these motions, I questioned why Spring Creek was explicitly mentioned in the North Platte Decree as included in the Whalen to Tri-State reach while the Laramie was not. June 1991 Transcript at 89-91. Nebraska has satisfactorily answered this question and the record supports her explanation. The express inclusion was necessitated by an omission from an exhibit Wyoming submitted and the Special Master's failure to include the subsequent corrections. Thus, the Supreme Court remarked that the Spring Creek accretions, accidentally left out of the Special Master's computations, "should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. *See* Nebraska Post-Hearing Brief at 14-17.

Finally, although the Special Master prefaced the decree he recommended to the Supreme Court with the words, "[w]ith respect to the water of the North Platte River and its tributaries, *except* the Laramie River," Doherty Report at 177 (emphasis added), in the final Decree the Supreme Court did not include this exclusionary language. While I am not inclined to inflate the significance of this omission, it may be interpreted as a reluctance to accept that wholesale exclusion. The Court, instead, addressed the Laramie with the following language in the Decree:

> This decree shall not affect . . . [t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River. . . .

Decree ¶ XII(d). This language echoes the Court's observation at the outset of its Opinion that the Laramie had previously been apportioned and that the prior apportionment would not be disturbed. *Id.* at 592 n.1. These pronouncements do not amount to declarations of new legal rights or reinterpretations of existing legal rights. They represent, rather, the confirmation of the status quo, a status quo in which rights to Laramie flows that were in excess of the dependable supply were not specifically apportioned.

Having found little enlightenment on the Laramie question in either the Decrees or the Doherty Report, I discuss below the more important Record evidence on this issue.

b. ***The Record in the Original Proceedings: Inclusion of Laramie Waters in the Whalen to Tri-State Apportionment***

As already noted, flows from the Laramie River were included in the Special Master's and Supreme Court's tabulation of natural flows available in the Whalen to Tri-State Reach.[69] The parties do not dispute that in the

[69] *See* Doherty Report at 67, Table III; *see also* First Interim Report at 24-25 n.48. Special Master Doherty reported that from

original proceedings they introduced substantial evidence and testimony concerning the Laramie River and its contribution to the North Platte.[70] In particular, Wyoming used Laramie flows in her allocation proposals for that stretch of the North Platte River. Further, all parties agree that any Laramie waters that actually flow into the North Platte River mainstem between Whalen and Tri-State were and still are subject to the apportionment under the North Platte Decree. *E.g.*, Christensen Affidavit ¶ 9; Nebraska Brief at 70.

The meaning of these facts, however, is unclear. Why was such evidence introduced? Why did Special Master Doherty include Laramie flows in that critical section of the river after announcing that the Laramie Decree would not be disturbed? And did the inclusion signify any intent on the part of the Special Master concerning the further apportionment of Laramie flows? The explanations offered by the parties are inconclusive and

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Whalen to the Nebraska state line, average annual contributions from 1895 to 1939 to the North Platte River, "including the Laramie," amounted to 281,940 acre feet. He also noted, in a chart setting forth contributions by state, that Wyoming's share included the Laramie. Doherty Report at 22 & Table n.3. The Supreme Court adopted these figures and cited them in its Opinion. 325 U.S. at 593 n.3.

In computing average usable water supplies in the Whalen-Tri-State reach from 1931 to 1940, the Special Master also expressly included Laramie flows. In Table III, titled "Analysis, Requirement, and Supply 1931-1940 Whalen-Tri-State Dam Section," there is a column listing Laramie River inflows for those years. Doherty Report at 67. The Special Master used the figures from that column in turn in a column labeled "Usable Increment Whalen to State Line," in Table IV of his Report, a table listing requirements and natural flow supplies 1931-1940 in the Whalen to Tri-State section. *Id.* at 71.

[70] Wyoming may be said to have assumed at the outset that some Laramie flows belonged in the North Platte. In her Answer in the original proceedings, Wyoming described the North Platte River as "augmented by tributary contributions, including those made by the Laramie River in the State of Wyoming." Answer at 16.

leave these matters in doubt. Painstaking review of the Record provides little enlightenment and provides no legal basis for granting summary judgment to either state on the propositions each advances.

Although it appeared before the recent round of briefing on the summary judgment motions that neither state sought a complete adjudication of Laramie River issues in 1945, First Interim Report at 24 n.48, Wyoming insists that Nebraska "got her day in court" on these issues and, therefore, cannot bring the present claims. Indeed, in hearings during the original proceedings—but apparently not in the briefs—Nebraska did raise the argument that she was entitled to Laramie waters. For example, at one point counsel for Nebraska protested that "[w]e have throughout the case made complaint[s] about the Laramie River, as well as other tributaries of the North Plate, that might supply water for Nebraska." Record at 18575.[71] But that does not alter my conclusion that the North Platte Decree cannot be read as a rejection of Nebraska's rights to Laramie waters. Other specific facts contradict this view. Although Special Master Doherty did state that he would not disturb the Laramie Decree, and prefaced his proposed Decree with the words "except the Laramie River," he made no express ruling that Nebraska had no rights in that stream. Given Nebraska's persistence on this matter, it may be assumed that Special Master Doherty would have analyzed or at least mentioned his rejection of Nebraska's rights in the Laramie somewhere in his lengthy report had he intended to resolve that question. Furthermore, a definitive resolution of the question is inconsistent with Special Master Doherty's actions in counting Laramie waters to determine available supplies for the apportionment in the North Platte's Whalen to Tri-State Reach.

Part of the solution to these puzzles may lie in Wyoming's and Nebraska's proposed methods for allocating

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[71] *See also supra* note 67.

the North Platte. Wyoming argued for a system of mass allocation similar to that adopted in *Colorado v. Wyoming*. Nebraska urged a system of interstate administration of all relevant water rights based on then-existing priorities. It was in the context of promoting these divergent approaches that the parties introduced data concerning the contributions of Laramie River inflows to the North Platte River.

Two Wyoming Exhibits offered to Special Master Doherty—170 and 173—are particularly instructive in this regard. These Exhibits were part of a series of tabulations and reconstructions of historical river flows accounting for then-extant development conditions.[72] Wyoming Exhibit 170 showed natural and return flows from the Laramie River below Wheatland entering the North Platte River and serving Nebraska lands irrigated by the North Platte Project. *See* Nebraska Appendices at A-204 to A-206. Exhibit 173 calculated accretions to the North Platte above the Nebraska state line, specifically suggesting that 85,000 acre feet per year from Laramie inflows would be available for downstream use. *See id.* at A-207. The latter Exhibit formed the basis for the above-mentioned Table III in the Doherty Report, which included computations for Laramie flows, *see* Doherty Report at 67, Table III, Col. 3 & n.2, and in turn ended up in the composite contributions mentioned in the Court's opinion.[73] 325 U.S. at 593 n.3.

Other such evidence was also introduced. For example, Wyoming Exhibit 86, which summarized North Platte River stream flows and canal diversions from 1930-1938 for the section between Whalen and Tri-State Dam,

[72] Wyoming Witness Elmer K. Nelson used reconstructed river flows for 1904 to 1930 and actual historical flows for 1931 to 1940. Record at 27554, 27559.

[73] Exhibit 173 also formed the basis for Nebraska's recent theory that she was apportioned reconstructed flows offered downstream by Wyoming.

showed average Laramie flows for that period to be 31,000 acre feet during the irrigation season. Nebraska Appendices at A-232 to A-235. Nebraska witness R.I. Meeker, a consulting engineer, testified that between 1931 and 1937 the Laramie River contributed average yearly flows of 125,000 acre feet to the North Platte River. Record at 26584-85 (discussing Nebraska Exhibit 618). Meeker also included Laramie flows in calculating what Nebraska claimed was the supply available to senior appropriators in Nebraska below Tri-State. *Id.* at 26516-17 (discussing Nebraska exhibit 631); *see also id.* at 21070.

Special Master Doherty also heard evidence that the Laramie River contributed to the North Platte supply for Nebraska lands irrigated by the North Platte project.[74] From these Exhibits, and especially from the use of Wyoming Exhibit 173 in Table III, Nebraska deduces that the Special Master and the Court implictly apportioned to her the included Laramie flows. Nebraska also advances the interesting theory that Wyoming *wanted* to apportion Laramie waters to Nebraska, or at least believed that those flows belonged to Nebraska and not to Wyoming. And Wyoming witness Elmer K. Nelson did testify that Laramie inflows would be available for use below Guernsey. *See id.* at 27536-37.

[74] *See, e.g.*, Wyoming Exhibit 146 (Nebraska Appendices at A-228) ("North Platte River: Means for 1931-1940. Summary of Stream Flows and Canal Diversions—in Acre Feet. Section: Below Whalen to Wyoming Nebraska Line."; Laramie River is listed as original water supply contributing mean of 42,910 acre feet during the non-irrigation season and 23,220 acre feet during the irrigation season.); Nebraska Exhibit 302 (Nebraska Appendices at A-240 to A-249) (Tables: 1936 Daily, Monthly, and Yearly Discharge Of Principal Tributaries Of North Platte River, Whalen Dam To North Platte, Nebraska); Nebraska Exhibit 361 (Nebraska Appendices at 250) (Average Yearly Mountain Runoff, 1909 to 1935, North Platte River Basin, Colorado and Wyoming, including figures for "Laramie River Basin Reconstructed Runoff").

Wyoming's use of evidence on the Laramie in the original proceedings arguably undermines the claim that she was protecting her rights to all flows of the Laramie beyond Colorado's share. Wyoming, however, insists that she presented the evidence solely to promote a mass allocation scheme and to free up North Platte supplies upstream for additional consumptive uses in Wyoming. As Wyoming explains it, under her mass allocation proposal Wyoming would have had a fixed obligation to Nebraska but no fixed source from which she had to fill that obligation—the overall supply in the basin would be a single "fund." "Wyoming would still have been free to completely dry up the Laramie but, if she did so, she would have to meet the delivery obligation [that would have obtained had the mass allocation proposal prevailed] at the state line by restricting uses of the North Platte above Whalen." Wyoming Brief at 20. In other words, Wyoming argues that she maintained rights to the entirety of the Laramie (minus Colorado's portion), but voluntarily chose to offer up a share of her entitlement.

In any event, Wyoming suggests that the evidence concerning the Laramie was meant only to show its insignificance to the North Platte. Nebraska witness R.I. Meeker did note the paucity of the flow:

> In the Laramie basin the up-river water, except a small amount of return flow, is consumed within the Laramie basin, and the only flows of water that reach the North Platte river from the Laramie river, are composed of waters from the North Laramie creek, the Sybil[l]e creek, and Chugwater creek, and such waters as flood spurts, and extreme high water, although there is a small amount of winter flow.

Record at 130. In later testimony concerning an exhibit illustrating the North Platte region, he explained:

> The Laramie River basin has been colored with a heavy yellow to indicate the extent of that river basin, and . . . to show that there is no dependable water

> reaching the North Platte there, [from] that drainage basin during the irrigation season.

Id. at 176-77. A witness for the United States also testified that the Laramie River was over-appropriated and that all its waters were already in use. *Id.* at 21549. From this testimony, Wyoming concludes that "Nebraska was left with no case for an apportionment of Laramie River water because her own evidence showed the insignificance of any contribution of the Laramie River after full development by Wyoming and Colorado" and thus the Special Master excluded the Laramie from the Decree. Wyoming Brief at 16.

Nebraska disagrees that the flows were so undependable as to be insignificant, noting the average annual flow figures quoted above. And if these flows were so insignificant, it is also counterintuitive that Wyoming would press for their inclusion as an important source for a North Platte mass allocation. In any event, whether the flows were great or small does not appear to be particularly relevant; they were obviously significant enough to be counted by the Special Master.

Wyoming also highlights two instances in the Record where Nebraska failed to protest and, in Wyoming's view, should have protested to preserve whatever stake she believed she had in the Laramie. First, Wyoming charges that Nebraska abandoned any claim to Laramie waters when she failed to take exception to the Special Master's decision not to disturb the Laramie Decree. Nebraska's answer to this is simple and persuasive—there was nothing to take exception to if she believed that she was entitled to that portion of the Laramie that reached the Whalen to Tri-State reach after Colorado's and Wyoming's uses under the Laramie Decree. But even if Nebraska did not believe she was entitled to specific Laramie flows, she justifiably could have assumed that the supply from the Laramie was not threatened, because Wyoming herself pushed for its inclusion, and the Special Master obliged.

A second omission Wyoming points to is Nebraska's failure to include the Laramie River in the interstate priority administration studies prepared for Special Master Doherty. *See* Nebraska Exhibits 400, 432, 619-22 (in Wyoming's Reply Brief, Appendix C); *see also* June 1991 Transcript at 67. "Had Nebraska wanted to continue her claim to an apportionment of the Laramie, she surely would have included Laramie River rights in her studies," Wyoming argues. "Instead, she asserted that Table XVII of the Doherty Report (pp. 86-87), which included no Laramie River rights, *contained all the information necessary* for an interstate priority schedule."[75] The commonsense appeal of Wyoming's argument here is not sufficient, however, to counter the Record evidence that Nebraska did purport to challenge all rights on the Laramie. *See, e.g.*, Record at 12388-89; Doherty Report at 271.

Finally, Wyoming finds support for her position in the fact that there also was evidence before the Special Master of her proposed future uses of the Laramie, uses that had been permitted but not yet developed. Wyoming Brief at 14-16. If the Special Master and the Court had intended to foreclose further use of the Laramie waters by Wyoming, she insists, they would have done so ex-

[75] Wyoming Supplemental Brief Regarding Summary Judgment (July 25, 1991) ("Wyoming Supplemental Brief") at 20-21 (citing Brief of State of Nebraska, Complainant (before the Supreme Court) at 28-30, 43, Wyoming Appendix at A42 to A43, A45) (emphasis in original).

Although Special Master Doherty asked Nebraska to revise that study, he did not ask her to include the Laramie. Wyoming suggests that had Special Master Doherty intended to include the Laramie specifically as Nebraska now suggests, surely he would have asked Nebraska to include the Laramie in the revised study. Wyoming Supplemental Brief at 20-21. The revisions he requested, however, concerned proposals to limit Nebraska canal uses in this reach and to exclude Nebraska uses below Tri-State. *See* Doherty Report at 103. The failure to focus on the Laramie thus proves nothing.

pressly, given their awareness of these proposals. Again, despite its superficial appeal, this argument fails to lock up the inquiry. Counsel for the United States offered a convincing explanation during the recent hearings on these motions:

> Ms. P. WEISS: That brings me to your question Doherty saying that Wyoming could dry up the Laramie. I believe it's very clear that he would not. It's simply not plausible that he would conceive that the flows he relied on, in part, to achieve the apportionment [would not continue]. . . . And he had the assurance that those flows would be there because, as of 1945, there was no better claim to the flows . . . that accrued in the Laramie River below Wheatland. . . . And that is shown by the fact that Nebraska, Wyoming and the United States all show the Laramie flows as available for apportionment.

June 1991 Transcript at 94-95. At that time, Wyoming was not threatening those flows nor apparently intending to make any claims to those flows. The Special Master merely shared all the parties' assumptions as to the sources of that stretch of the North Platte.

Counsel for the United States has also pointed out that the Supreme Court in an equitable apportionment proceeding would not deal with hypothetical future uses:

> Ms. P. WEISS: [T]he Supreme Court never gives blocks of water to anyone for an unspecified use. When you have contested water with competing uses, there is the investigation which the Supreme Court carried out in this case, of what the establish[ed] use is . . .
>
> [I]t simply doesn't make sense under any equitable apportionment jurisprudence to say that the Supreme Court would have told a state, yes, I know you don't have any intended use for this block of water. And, yes, there is that other state standing there just dying for the water. But I'm going to tell you that you may keep it, and when you think

> up a use for it, it's yours. That just doesn't happen in an apportionment case.

Id. at 100-01. The evident common sense and truth of this statement has not been challenged by the other parties nor, I believe, could it be.

I find that the essential facts that emerge from delving further into the Record are these: at that time, as now, the Laramie River was over-appropriated and its flows undependable and often insubstantial. Even so, both states introduced evidence of the Laramie's contributions to the North Platte below Whalen, with Wyoming insisting that the Laramie could and should be counted on to supply 85,000 acre feet a year in her then-proposed mass allocation to Nebraska. Although it is nowhere explicitly stated, it appears likely that the flows Wyoming envisioned would be supplied by the Laramie were those in excess of the beneficial uses considered in formulating the Laramie Decree.[76] Neither state satisfactorily explains the apparent contradiction in declaring that an over-appropriated stream could be relied upon to contribute flows on a regular basis. Despite Wyoming's explanation that the evidence was merely part of its litigation strategy,[77] Wyoming obviously believed that—and behaved as if—that stretch of the North Platte should draw Laramie flows.[78] Nonetheless, the states accepted the status quo

[76] *See* 259 U.S. at 495-96 ("The evidence shows that the Wyoming appropriations having priorities senior to the one in Colorado, and which are dependent on the available supply before named, cover 181,500 acres of land, and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre-feet.").

[77] That is, she was including Laramie waters as part of a larger "fund," but could choose to use other sources instead.

[78] Near the end of the original proceedings, in its brief of exceptions to the Special Master's Report to the Supreme Court, Wyoming wrote that the natural flow of the Whalen to Tri-State section of the North Platte River was comprised of "the inflow of the Laramie River, and the other accretions between Whalen . . . and Tri-State." Wyoming Brief (1944) at 41.

when the North Platte Decree issued: some Laramie flows were counted on for the pivotal reach of the North Platte that was apportioned 75 percent to Nebraska and 25 percent to Wyoming.

It is not the case, as Nebraska would have it, that Wyoming advocated *apportioning* specific Laramie flows to Nebraska. Even a generous reading does not support converting the use of the flow figures into a legal conclusion that Laramie waters were precisely apportioned. I find that the Special Master and the Court merely took account of waters that historically and at that time contributed to the Whalen to Tri-State reach and assumed that those same sources would continue to contribute.

Thus, both states err in framing the question in terms of how or to whom the Laramie flows were apportioned in the North Platte Decree. I find that they simply were not apportioned, although their continued contribution to the North Platte was assumed. The 1945 decision may have been based on a supposition that ultimately was not carefully examined.[79] I agree with the United States' observation that "no *precise* entitlement to [these] flows was actually determined" by the Special Master or the Court.[80] This conclusion does not entail accepting Wyoming's claims to all waters beyond Colorado's decreed share. Instead, the Record teaches that up to and through

[79] As Nebraska's Assistant Attorney General pointed out, the persistent drought conditions during the original proceedings might have led to the assumption that there would not be (because there could not be) future additional uses of the Laramie. June 1991 Transcript at 258.

[80] Memorandum For The United States In Response To The Motions For Summary Judgment Of Nebraska, Wyoming, Colorado, Basin Electric, And The Platte River Trust (Apr. 26, 1991) (emphasis added).

the North Platte litigation there were no better claims to those flows of the Laramie below Wheatland. The Special Master's "painstaking approach to figuring out what the available water was to be apportioned, just would not make sense, if he assumed that Wyoming could come in later and take that water away." June 1991 Transcript at 98. Finally, it must be remembered that in such cases water is not given for unspecified uses. *Id.* at 100.

The foregoing review of the Record in the original proceedings confirms my hypothesis that Special Master Doherty and the Supreme Court, in developing the North Platte Decree, failed to examine the Laramie Decree exhaustively, and essentially went no further than to honor it as it stood. *See* First Interim Report at 24 n.48. I conclude that, although the disputed Laramie flows were not apportioned to Nebraska, neither were they apportioned to Wyoming. Rather, an assumption was made: the Laramie was one of the sources of water for the North Platte, and it would continue to be so. And, as will be discussed below, that assumption has governed the administration of the North Platte Decree from its entry until the onset of this litigation.

3. *Conduct of the Parties Since 1945*

The measurements and procedures used to accomplish the 75/25 division of Laramie water actually arriving in North Platte have not changed significantly since the Decree's inception.[81] The basic question concerning the post-Decree conduct of the parties is how the parties have regarded the flows from the Laramie River in the context of the natural flows in the Whalen to Tri-State reach.

According to Wyoming, the significant facts are these: the Decree itself imposes no monitoring or reporting requirements on Wyoming regarding her uses of the Laramie. Neither Nebraska nor the United States has ever requested Wyoming to account for diversions or uses on the Laramie. To the extent that administration of the Decree has taken the Laramie River into account, it has only been regarded as making an incidental contribution.[82] Finally, post-1945 depletions by Wyoming uses in the Laramie basin have never been accounted for in determining Wyoming's 25 percent mainstem entitlement. Second Fassett Affidavit; Bishop Affidavit.

[81] *See* Affidavit of Floyd A. Bishop (Feb. 19, 1991) ("Bishop Affidavit") ¶ 6, attached to Wyoming Brief; Affidavit of Ann S. Bleed (Apr. 25, 1991) ("Second Bleed Affidavit") ¶ 2, attached to Nebraska Response.

Those facts, although undisputed, do not have the significance Wyoming attaches to them. Although Nebraska, Wyoming, and the United States keep separate accounting systems for determining the supply and allocation of natural flow in the Whalen to Tri-State reach, they all use the same formula to calculate the supply:

1. Calculate total supply of water in section by summing all outflows from section (all diversions plus flows passing Tri-State, all measured daily);
2. Subtract from that total supply in the section the amount of storage water (adjusted for decreed evaporative losses) in river at Whalen Dam;
3. The resulting total natural flow supply is divided (according to Decree) 75/25.

Wyoming Brief at 28. Thus, as Nebraska states, no tributary inflow is singled out in the operating and accounting procedures used to implement the Decree. Indeed, no measurements of natural flow inflows from any tributaries are used in calculating the apportionable natural flow and, thus, the Laramie has never been treated differently from any other natural flow contributions to this reach. The important facts, rather, are that "[t]he daily accounting of natural flow available in the Whalen

[82] *See* Bishop Affidavit; Second Affidavit of Gordon W. Fassett (Feb. 19, 1991) ("Second Fassett Affidavit"), attached to Wyoming Brief; Wyoming Brief at 26-27, 41-42.

Diversion Dam to Tri-State Dam section has included the Laramie River flows since 1945," Christensen Affidavit ¶ 9,[83] and that Wyoming has participated uncomplainingly in these accountings.

Furthermore, it is significant that Laramie River inflows are counted explicitly when there has been channel loss in the section. As explained by Floyd A. Bishop, consultant and former State Engineer of Wyoming, the reach occasionally experiences heavy channel losses, and to keep

> natural flows from absorbing the full amount of these channel losses, Wyoming, Nebraska, and United States Bureau of Reclamation agreed in 1965 to apportion the channel loss between storage and natural flow according to the percentage of each which was in the river section at the time. . . . Laramie River inflows comprise one part of the sum of the tributary inflows used in the channel loss formula.

Bishop Affidavit ¶ 7. Thus, in the one instance when tributary contributions are actually measured in ad-

[83] *See also* Bishop Affidavit, Exhibit A ¶ 4 (North Platte River—Formula for computing natural flow and storage flow above the Tri-State Dam, agreed to by U.S. Bureau of Reclamation, Wyoming and Nebraska ("For natural flow in the Guernsey-Tri-state Dam Section—Compute as follows: Natural Flow below Tri-state dam plus total canal diversions Tri-state to Guernsey, less storage release at Guernsey reduced by storage losses below Guernsey.")); Exhibit B at 2, 4, 6; Exhibit C at 1. *See also* Second Bleed Affidavit, explaining the agreed-upon formula for calculating natural flow:

> This method is merely a simple means of arriving at a natural flow number. Theoretically it arrives at the same result that would be achieved by carefully measuring and summing all natural flow inflows to the section. Thus, the lack of use of the gaged inflow from the Laramie River should not be construed to mean that the contributions of the Laramie River are unimportant or incidental. On the contrary, the Laramie River is the major tributary inflow to the section.

Second Bleed Affidavit ¶ 2.

ministering the North Platte Decree, the Laramie flows have been included.

Nebraska also characterizes the post-Decree contributions of the Laramie to the North Platte River from 1946 to 1979 as significant, averaging 46,982 acre feet per year during the irrigation season and 35,406 acre feet per year during the non-irrigation season. Affidavit of Ann S. Bleed (Mar. 1, 1991) ("First Bleed Affidavit") at 32, Table 2, attached to Nebraska Brief. A former state hydrologist for Nebraska, consultant H. Lee Becker, asserts that "[t]he flows of the Laramie River constitute the major contribution to the natural flow in the Whalen Dam to Tri-State Dam reach" and, from 1946 to 1987, represented "approximately 65 percent of the gaged May through September tributary inflow to this section."[84]

Since 1945, Laramie flows have been counted in and have made measurable contributions to the waters subject to the 75/25 apportionment. That no specific demands have been made on Wyoming respecting these flows means little in light of the overwhelming evidence of acceptance of the status quo: that some Laramie waters were always expected to be in the North Platte. Like the Record in the original proceedings, the conduct of the parties since 1945 reveals no more and no less than this finding.

In summary, I conclude that the Laramie question cannot be resolved in the manner either state wishes and I therefore recommend that the court deny both the Nebraska and Wyoming motions for summary judgment.

[84] Affidavit of H. Lee Becker (Mar. 1, 1991) ("First Becker Affidavit") ¶ 8, attached to Nebraska Brief. *See also* Wyoming Brief, Appendix E at E-22 (speech by John Neuberger, Director, Nebraska Department of Water Resources, Mar. 16, 1979) ("Even after you consider the water uses in Wyoming the Laramie River has been contributing around 12 percent of the average annual flow across the [Wyoming-Nebraska] state line.").

Neither Special Master Doherty nor the Supreme Court appears to have delved into the fate of waters in excess of dependable flows. The North Platte Decree, by respecting but not modifying the Laramie Decree, neither adds to nor subtracts from the analysis in the *Wyoming v. Colorado* opinions. I conclude that the Decrees grant no license to Wyoming to dewater the Laramie, and accord no specific apportionment to Nebraska. I have determined, however, that Nebraska has equities to be considered based on contributions the Laramie has made and continues to make to the Whalen to Tri-State section.

B. Grayrocks and Corn Creek

Nebraska has sought injunctive relief with respect to one existing and one proposed project in the Laramie River basin, the existing Grayrocks Reservoir and the proposed Corn Creek Project.[85] Nebraska Brief at 91-92. Having found from the Record that Laramie waters are part of the North Platte supply system and were counted in the waters reaching the North Platte mainstem by Special Master Doherty and the Court, and that Nebraska therefore has equities to be considered respecting the Laramie's contributions to the mainstem, relief may be required if injury to Nebraska's equities can be shown. Nebraska has made a sufficient showing to proceed to the next step on these issues. As in the original proceedings, the states here are claiming rights in "a river whose dependable natural flow during the irrigation season has long been over-appropriated, claims based not only on present uses but on projected additional uses as well." 325 U.S. at 610. Also, like then, the record is at this juncture "inconclusive in showing the existence or extent of actual damage to Nebraska." *Id.* But Nebraska should now have the opportunity to show injury. As the Court has explained:

[85] Both projects are described in Appendices B and C to the First Interim Report. *See* First Interim Report at 9a-14a.

> [W]e know that deprivation of water in arid or semi-arid regions cannot help but be injurious. That was the basis for the apportionment of water made by the Court in *State of Wyoming v. Colorado*, supra. There the only showing of injury or threat of injury was the inadequacy of the supply of water to meet all appropriative rights. . . . If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient. But . . . where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination.

Id.

1. *Grayrocks*

Grayrocks Dam, which supplies process and cooling water to a coal-fired power generating plant, was completed in 1980. The issues respecting Grayrocks [86] were litigated in 1978 in federal court and later resolved by a settlement among the United States Department of Justice, the United States Rural Electrification Administration, the United States Army Corps of Engineers, Nebraska, Basin, and others, including the National Wildlife Federation and Audubon. The 1978 Settlement Agreement limited the annual water consumption of the power plant and provided for certain minimum releases and flows to benefit Nebraska.[87] While Nebraska has re-

[86] *Amicus* Basin operates the power plant and reservoir at Grayrocks. *See supra* note 10.

[87] The 1978 Settlement Agreement provides, in relevant part:

> 1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre feet per year.

Paragraph 2 sets forth the sources for the 23,250 acre-feet and provides that:

> The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above

affirmed in the current proceedings that Grayrocks will not harm her if operated in accordance with the 1978 Settlement Agreement,[88] and while Basin agrees with Wyoming that Wyoming has so far not interfered in the

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and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that: . . .

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

Paragraph 4 provides:

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive), whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May through September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

. . . .

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

[88] *See, e.g.*, Nebraska Response at 37 n.16 ("Nebraska supports the Grayrocks Settlement Agreement and considers itself duty bound to uphold it. Assuming no interference from Wyoming, the Settlement Agreement guarantees minimum non-irrigation season instream flows, as well as protecting the substance of Nebraska's rights to Laramie waters under the North Platte Decree.").

operation pursuant to the 1978 Settlement Agreement,[89] Wyoming has repeatedly declined my several invitations to give assurances that she will in the future support Basin's obligations to maintain flows against would-be Wyoming junior appropriators. Wyoming recently commented on this matter at the hearings on the summary judgment motions:

> MR. OLPIN: [T]here are a lot of equities in [seeing] that the benefit[s] of the bargain made in '78 are not taken away from Basin. A part of that bargain has water flowing downstream between the Grayrocks Dam and the mainstem. I am unclear on what Wyoming is saying about the future of those flows. I have never heard anything as crisp as I would like to hear on what Wyoming thinks about those flows and their future. Would you enlighten me?
>
> MR. WOODRUFF: The Grayrocks Settlement Agreement provided for a regimen of flows, mainly some flows from the mouth of the Laramie River. Basin Electric Power Cooperative is obligated to maintain those flows at the mouth. There is no dispute about that. . . . It's also . . . undisputed that Wyoming has never done anything to interfere with Basin's obligations.
>
> MR. OLPIN: I want to look to the future, though, Mr. Woodruff.
>
> MR. WOODRUFF: Okay. Let's look to the future. Wyoming does not contend that the Grayrocks Settlement Agreement violates Wyoming law, or is illegal in any way. They do contend that it does not supersede Wyoming law. Wyoming law is, the use of water under storage permit, like the use of water in a direct flow permit, is subject to the terms of that permit.
>
> And, if the permit does not provide for delivery of water to the mouth of the river, or it maintains flows

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[89] June 1991 Transcript at 105; Basin Brief at 4, 8.

for instream value reasons, that is not part of the permits as a matter of Wyoming law. We can't change that.

. . . .

. . . State law very simply says, that if there is water in the river that is not subject to a permit, not part of a water right, it's unappropriated water, it's subject to diversion. The law is the same in Nebraska.

They took that into account by saying, well, okay. Let's make sure that these releases that are going to require the Basin, are delivered to the mouth and not just delivered below the dam. And that puts the obligation on Basin. It's undisputed that Wyoming is not trying to interfere with that. . . . The only purpose for enjoining Wyoming from interfering with the private agreement between two parties would be, I guess, to aid one or the other of the parties. I think you have to find some reason to do that.

June 1991 Transcript at 68-70, 74 (emphasis added).

In view of Wyoming's refusal to assure that she will support the 1978 Settlement Agreement,[90] her insistence that the depletion of Grayrocks releases by new appropriators[91] could be permitted under Wyoming law despite the terms of the 1978 Settlement Agreement, and her lack

[90] At the March 9, 1992, hearing held in Pasadena, California to afford parties and *amici* an opportunity to comment on a draft of this report, Wyoming reiterated this point:

> We think that interstate apportionment was worked in 1945 upon the Laramie River. We are certainly not willing at this point to allow a settlement arrived at in a case in front of the District Court of Nebraska to work an apportionment of the Laramie River that was not otherwise achieved in the Supreme Court.

Transcript of Proceedings, Pasadena, California (Mar. 9, 1992) ("March 1992 Transcript") at 74.

[91] At the March, 1992 hearing, Nebraska alleged that such Wyoming appropriators are already on the scene. *See* March 1992 Transcript at 123.

of participation in the Grayrocks proceedings—an equitable consideration—I recommend that paragraph XIII of the Decree be amended to make relief available at the foot of the Decree. Such a provision would allow Nebraska or the United States to request relief if a circumstance arises in the future making the case for a need to prevent injuries that could attend Basin's inability to comply with flow releases under the 1978 Settlement Agreement by reason of Wyoming's administration of her water laws. Such a Decree provision presently will take care of the Grayrocks issue.[92]

2. *Corn Creek*

Corn Creek is a proposed irrigation project that would irrigate lands in Goshen County, Wyoming south of the confluence of the Laramie and North Platte Rivers. The 1978 Settlement Agreement also sets forth a method for handling future depletions caused by operation of Corn Creek, with Basin and Nebraska agreeing to bear the burden of the depletions equally.[93]

[92] I find such a provision necessary despite Basin's ability to participate in potential water rights proceedings in Wyoming because several other interests and equities, apart from Basin's, might be affected. *See* March 1992 Transcript at 74-75.

[93] The 1978 Settlement Agreement provides the following with respect to Corn Creek:

> 5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the

Until recently, there was conflicting testimony in the Record concerning the likelihood the Corn Creek project will be developed.[94] At the March 9, 1992, hearing in Pasadena on the preliminary draft of this second interim report, however, Wyoming testified that Corn Creek is a live project:

> MR. COOK: [M]y old friend Stanley K. Hathaway, former Governor of the State of Wyoming, . . . asked me to declare positively the Corn Creek project, in the eyes of his client, Corn Creek Irrigation District, is an active and vital project.

March 1992 Transcript at 72. There is also some concern that the blueprint in the 1978 Settlement Agreement for handling depletions of Laramie flows caused by Corn Creek might be subject to challenge on account of a mutual mistake of material fact. Nebraska maintains

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Project may acquire a portion of this amount or an equivalent amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

1978 Settlement Agreement ¶ 5.

[94] *See, e.g.*, June 1991 Transcript at 260:

> MR. SIEVERS: Yesterday, Mr. Weinberg sat—stood here—I overheard him chastising Mr. Rich because the Department of the Interior had not acted upon Corn Creek's request for waters for Corn Creek. It's a live project, they're trying to get water out of the Interior.

See also id. at 268-69:

> MR. WEINBERG: I should say something about Mr. Sievers quoting me in the conversation with Mr. Rich. I think he said I chastised Mr. Rich because the Bureau hasn't yet awarded—given a Glendo water contract to Corn Creek.
>
> Well, neither Mr. Rich, nor I, nor Mr. Sievers are witnesses in this case. But . . .—what I was talking about with Mr. Rich was an effort to find out where that matter stands in the Interior Department, and, at the risk of being accused of testifying, from what I understand it makes the prospect of Corn Creek even more remote than we have stated in our brief and Wyoming has stated in its brief.

that she entered that part of the 1978 Settlement Agreement concerning Corn Creek on the implicit understanding that there would be return flows from Corn Creek, now a proposition that is questioned.[95]

Accordingly, with respect to Corn Creek, I propose to hold a status conference to determine whether to proceed to a full trial on that issue. At that conference, I propose to consider such of the following questions, among others, as may be fruitful: was there a mutual mistake of material fact underlying the 1978 Settlement Agreement, and will the operation of Corn Creek disturb the delicate balance of the North Platte River and thereby cause injury to Nebraska's apportionment under the Decree? If Nebraska sustains her evidentiary burden at that status conference, we will then proceed to a trial on appropriate Corn Creek issues.

IV. THE DEER CREEK PROJECT

Nebraska seeks an injunction barring Wyoming from proceeding with plans to construct and operate a 60,000 acre foot capacity reservoir on Deer Creek, a right-bank tributary of the North Platte entering the mainstem between the Pathfinder Reservoir and the downstream Guernsey Reservoir.[96] The Deer Creek Project would add storage capacity and thus potentially implicates the Court's retained jurisdiction to review:

> The question of the effect of the construction or threatened construction of storage capacity not now existing on the tributaries entering the North Platte

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[95] *See, e.g.*, June 1991 Transcript at 260, 269. The issue of return flows was apparently not expressly addressed during the negotiations leading to the 1978 Settlement Agreement. *See* March 1992 Transcript at 100-01.

[96] As previously indicated, both the Pathfinder and the Guernsey Reservoirs are components of the United States Bureau of Reclamation's North Platte Project.

River between Pathfinder Reservoir and Guernsey Reservoir.

Decree ¶ XIII(c).[97]

The Project presents the question of the relationship between two paragraphs of the Decree, the above-quoted paragraph XIII(c) and paragraph X, a broadly stated exemption for domestic, municipal and stockwatering uses, under which Wyoming claims the Deer Creek Project falls. The Project's stated purposes are to provide a reliable municipal water supply for Casper and other Wyoming communities and, secondarily, to provide for their future growth. Deer Creek FEIS at i. Wyoming has also contemplated using the project's yield for non-municipal purposes until the full annual yield is needed for municipal uses. First Interim Report at 28. Because Deer Creek enters the North Platte downstream of Casper, the State of Wyoming plans to make water available to Casper through a system of exchanges. The Deer Creek Project will make available water releases to downstream appropriations having senior Wyoming appropriative water rights while Casper continues to divert from the mainstream under its more junior appropriations. *Id.*[98]

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[97] Nebraska's 1986 petition invokes this provision by asserting that Wyoming is threatening to deplete North Platte River "by the proposed construction of storage capacity on the tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Nebraska Petition at 2.

[98] After expressing some inconsistent views earlier in the present proceedings, Nebraska is now in agreement with Wyoming that the municipal water rights of Casper and the other Wyoming communities are properly administered in priority with other Wyoming water rights. March 1992 Transcript at 39-40. This shared view is consistent with paragraph XII(a) of the Decree, which provides that the relative rights of water users within the three States are not affected "except as may be otherwise specifically provided herein." There is no Decree provision that specifically calls for a contrary administration of municipal water rights.

Under both Wyoming and Nebraska law, preference is accorded municipal uses to the extent "that a municipal use could deprive a

For the second time Wyoming has moved for summary judgment on Nebraska's claims regarding Deer Creek. In June, 1989, I denied Wyoming's first motion because I concluded there were genuine issues of material fact precluding summary judgment. First Interim Report at 27-32. Wyoming brings this second motion claiming that extensive discovery conducted since then has established that, as a matter of law on two separate grounds, Deer Creek will not violate Nebraska's apportionment under the Decree. I recommend denying this second summary judgment motion for the same reason—genuine issues of material fact still preclude summary judgment.

The first ground Wyoming invokes is that Nebraska has not proffered the required factual showing respecting threatened injury from the construction and operation of Wyoming's proposed project on the Deer Creek tributary. Thus, Wyoming contends that Nebraska is not entitled to a trial on the effect of threatened construction of new storage capacity on the tributaries between Pathfinder and Guernsey Reservoirs under paragraph III(c) of the Decree. Wyoming invokes the summary judgment standards recently articulated by this Court. *See supra* at 10-13.

As a separate ground for summary judgment, Wyoming asserts that Deer Creek, or at least the major part of it, is exempted from challenge under the Decree by paragraph X, which provides that the Decree shall not "affect or restrict" Colorado and Wyoming water uses

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senior irrigator or other nonpreferred user of water only if compensation were paid for the taking." Wyoming Hearing Memorandum On The Question Of Whether Paragraph X Of The Decree Exempts Municipal Uses In Wyoming And Colorado From The Operation Of The Individual States' Law Of Prior Appropriation (Mar. 9, 1992) at 6. Wyoming has declared that "[n]either state ever asserted that a municipal water right should be exempt from the intrastate law of prior appropriation." *Id.* Those principles of intrastate administration pose vexing questions for the interpretation and application of paragraph X, some of which are addressed briefly at 86-87 *infra*.

"for ordinary and usual domestic, municipal and stock watering purposes and consumption." [99]

For the reasons explained below, Wyoming's motion for summary judgment cannot be granted on either basis.

A. The Effect of Threatened Tributary Storage Capacity

In the original proceedings Special Master Doherty concluded that the run-off from the tributaries below Pathfinder and above Guernsey did not then require regulation by the Decree. The evidence indicated that tributary run-off essentially was exhausted before any shortages occurred in the mainstem and that, accordingly, the regulation of the tributaries would not be of material benefit. Doherty Report at 145.

[99] The United States and Nebraska take the position that municipal projects on the tributaries between the Pathfinder and Guernsey Reservoirs stand on the same footing under paragraph XIII(c) of the Decree as do nonmunicipal water projects on tributaries in that reach of the river. Thus, it is argued, paragraph X does not foreclose the paragraph XIII(c) inquiry concerning the effect of threatened construction of new tributary municipal storage capacity in this reach. I do not accept this reading as there is nothing on the face of paragraph X to support such a narrowing of the municipal exemption.

Moreover, the applicability of the paragraph X exemption to the tributaries upstream of Pathfinder is acknowledged expressly in paragraph IX, which excuses Colorado and Wyoming from record-keeping duties respecting municipal uses in those upstream reaches. There is nothing in paragraph X's text that supports an argument for different treatment of municipal uses on tributaries depending on whether they enter the mainstem upstream or downstream of Pathfinder. Thus, paragraph X means exactly what it says in its statement that the Decree does not affect or restrict municipal uses or diversions of water "from the North Platte River and its tributaries."

That is not to say, of course, that municipal uses can in no circumstances be scrutinized. Paragraph XIII(f) of the Decree contains a catch-all reopener provision authorizing further relief if there should be "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked. Neither Nebraska nor the United States, however, has sought at this stage to have the municipal exemption itself examined under paragraph XIII(f).

The United States expressed concern that some tributary regulation between Pathfinder and Guernsey was essential, fearing that additional storage capacity on those tributaries could reduce the mainstem flows for storage in Guernsey and the Inland Lake Reservoirs of the North Platte Project. The Court agreed with the Special Master on the absence of a present threat but allowed that "if such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction," 325 U.S. at 625, and included the language in paragraph XIII's reopener provision, quoted above, retaining jurisdiction for that purpose.

Wyoming candidly admits that the operation of the project will deplete mainstem natural flows but insists that Nebraska has not proffered any showing that those depletions will injure Nebraska's apportionment under the Decree. June 1991 Transcript at 21-22. Wyoming maintains that, under this Court's recent rulings, Nebraska cannot resist summary judgment because she has not made the threshold showing of facts that would support such a finding of injury by a jury.

While Wyoming's statement of the standard is correct, her assessment of Nebraska's evidence is not. I have determined that the Second Affidavit of H. Lee Becker submitted by Nebraska is itself sufficient to require denial of summary judgment for Wyoming.[100] Mr. Becker, a former state hydrologist for the Nebraska Department of Water Resources, reported the results of his examination of two models designed to show the impacts of operating

[100] Affidavit of H. Lee Becker (Apr. 25, 1991) ("Second Becker Affidavit"), attached to Nebraska Response.

the proposed Deer Creek Project. One model, the North Platte River Simulation Model ("NPRSM"), was developed for the Wyoming Water Development Commission for use in connection with the environmental permitting of the project. That model, according to Mr. Becker, reflects project operations in a manner designed to minimize the impacts of the Deer Creek Project on the flows below the Tri-State Dam where critical wildlife habitat might be affected. Mr. Becker reconfirmed his testimony in a previous affidavit that operations in accordance with the NPRSM:

> [P]redicted that reductions in the average end of year carryover storage of both the Pathfinder and Kendrick ownerships could be as high as 25,000 acre feet, and 58,000 acre feet, respectively. Such reductions in carryover storage could limit diversions in the Whalen Dam to Tri-State reach in a series of dry years.

Second Becker Affidavit ¶ 2.

If, on the other hand, the Deer Creek Project were to be operated in accordance with another model developed by Mr. Becker incorporating "reservoir operations, natural flow and ownership accounting, and the operation of the Deer Creek reservoir," he concluded that the result would:

> [S]how that the major impacts of the Deer Creek Project are on flows below the Tri-State Dam with lesser impacts on reservoir ownerships. With greater impacts on flows below the Tri-State Dam there would be a greater likelihood that the Deer Creek Project would jeopardize the habitat of the endangered and threatened species in Nebraska.

Id. ¶ 3.

Mr. Becker reported that the two different models showed that the alternative operational plans could either minimize the impacts below Tri-State Dam or minimize impacts on the upstream reservoirs. His final conclusion,

however, was that "the impacts can be transferred from one location to another, but they cannot be obliterated." *Id.* at 10.

Wyoming has not satisfactorily countered Mr. Becker's analysis. At the hearing in June, 1991, counsel for Wyoming attempted to interpret an earlier Becker affidavit as supporting the proposition that Mr. Becker had found that historic canal diversions in the Whalen to Tri-State reach "can be met with Deer Creek, or Deer Creek and Inland Lakes, or Deer Creek and Laramie, or all of the various combinations." June 1991 Transcript at 19. Wyoming counsel did not explain away, however, the prospect that operations under the NPRSM, which may well be required by the federal environmental laws, could result in reducing carryover storage and limiting the Whalen to Tri-State diversions in a series of dry years.

I therefore recommend that the Court deny Wyoming's motion. "[T]he facts specifically averred by [Nebraska] contradict facts specifically averred by [Wyoming]." *Lujan*, 110 S. Ct. at 3188. We shall therefore proceed to trial on the Deer Creek Project's effects on "the delicate balance of the river," 325 U.S. at 625, *unless* Wyoming can establish that the Deer Creek Project fits within the Decree's paragraph X municipal exemption.

B. The Municipal Exemption

As indicated previously, Wyoming characterizes Deer Creek as a municipal project designed to furnish water for Casper and other Wyoming communities and, therefore, claims that it is exempt from the constraints of the Decree by paragraph X, which provides:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

Although Deer Creek enters the North Platte mainstem downstream of Casper, the State of Wyoming takes the

position that the project's primary function will be to furnish Casper and other Wyoming communities with municipal water supplies by exchange. The proposed exchange is designed to offset upstream municipal diversions from the North Platte mainstem by supplying water to downstream Wyoming appropriators having rights senior to those of Casper and the other communities. This claimed municipal function of the project was invoked by Wyoming in her first motion for summary judgment. My decision to deny Wyoming's motion at that time was grounded in part on the need for evidence to determine the extent to which the Deer Creek project will be entitled to the municipal exemption. I therefore turn first to a further examination of the nature and scope of the paragraph X municipal exemption and then to a consideration of whether or to what extent the Deer Creek project fits within that exemption.

1. *The Nature and Scope of the Exemption*

There is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption. Apparently, the basic concept was agreed upon by the parties near the end as consideration was being given to the form of the Decree. The Special Master, responding to suggestions proffered by the States, recommended to the Court an exemption for ordinary and usual domestic and municipal uses served by diversions from the North Platte River in Colorado and Wyoming. Doherty Report at 180. Subsequently, the Court, at the behest of Wyoming, broadened the exemption to encompass diversions from the tributaries as well as from the North Platte mainstem and to exempt stock watering uses as well as domestic and municipal uses. 325 U.S. at 656. The Record in the original proceedings, however, contains little that is helpful in interpreting and applying the sparse text of paragraph X and affords no basis for taking away from its plain meaning that the

ordinary and usual water uses within its scope were neither to be affected nor restricted by the Decree.[101]

Indeed, paragraph X poses some mysteries, as the United States has shown. During the original proceedings, the parties strenuously battled over small quantities of water, such as the 2,000 acre feet of inflows from Spring Creek. *See* Decree ¶ 5. Yet, all of the parties agreed to paragraph X. Counsel for the United States commented on this at the June, 1991 hearing as follows:

> MS. WEISS: You might wonder, in a lawsuit that was so hotly contested for water, why that provision was agreed to. This was a case involving a vastly overappropriated river.
>
> I think the figures, and the Opinion, of the Supreme Court show that during those years of drought, roughly 48 percent of the requirements of the diverters on the river were met. Everybody was fighting over every drop. . . .
>
> Colorado sought to irrigate an extra 10,000 acres of land . . . And that was denied by the Court. . . . What's interesting about [paragraph] 10 is that . . . [t]here was no controversy about it. It's not plausible to believe that they were contemplating a 60,000 acre foot storage project when they agreed to [paragraph] 10.

June 1991 Transcript at 43.[102]

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[101] *See* Wyoming Brief at 102 n.32 ("Wyoming has searched the record, pleadings and briefs . . . for the source of the reported agreement of the parties regarding municipal use. . . . No clear expression of the agreement was found in the record.").

[102] From Wyoming's perspective, not surprisingly, the scale of the Deer Creek Project is seen in a quite different light. At the March, 1992 hearing, Wyoming commented:

> MR. COOK: Nebraska's problems are many and we have heard in our arguments in June that the Trust and Audubon agree with Nebraska to one extent, they wanted to get the water downhill into Nebraska and then they will fight over it. . . .
>
> But let me suggest to you also that with all of those interests and all of their past sins down in Nebraska over the use of

During the course of the present proceedings, Nebraska has taken a number of different positions on the meaning of paragraph X. Initially, she contended that the only exempt uses were those municipal uses in existence at the time of the Decree and that subsequent municipal projects were simply outside its scope. That contention, however, finds no support in the language of paragraph X which provides no basis for differential treatment of municipal projects constructed before and after the Decree. Ultimately, Nebraska ceased to press that argument.

Both Nebraska and the United States have at various times taken the position that future municipal projects are entitled to the exemption only if the resulting municipal uses are non-consumptive. *E.g.*, *id.* at 254. That position, however, runs afoul of the express language of paragraph X and common sense as well. Paragraph X by its very terms applies to "ordinary and usual domestic, municipal and stock watering purposes and *consumption*" (emphasis added). A municipal project, therefore, does not fall outside paragraph X's scope merely because it consumes some amount of water. Further, while there can be significant return flows from municipal water uses, such uses always consume some water, and Colorado and Wyoming cannot be expected to engineer their future municipal projects to make them entirely non-consumptive.

At the hearing in Salt Lake City in June, 1991, the United States for the first time argued that the Deer

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water, that now they are looking to Wyoming and Colorado . . . to solve those problems at the expense of little projects. . . . 10,000 acre feet in this river that has 2 million, 2½ [million] acre feet storage in Wyoming, another 2 million in Nebraska, is just maddening to me. It boggles my mind. . . .

I think about [Nebraska and its misallocation problems] a little bit like their view is somewhat . . . [like] what Lady Macbeth said after she had just planted the murder weapons on the King's servants, she said, "Retire we to our chambers. A little water cleans us of this deed."

March 1992 Transcript at 131-32.

Creek Project cannot qualify under paragraph X because it is designed to *store* water for subsequent releases. The United States contended that the exemption by its terms applies only to the "*use or diversion*" of water and makes no reference to *storage* of water for municipal uses. Nebraska does not join the United States in this argument and concedes that an otherwise qualifying municipal project properly might have a storage feature. June 1991 Transcript at 34-35.

I agree with Wyoming and Nebraska that the mere existence of a storage feature does not by itself disqualify what would otherwise be an ordinary and usual municipal project. The common and sometimes essential use of reservoirs to store water prior to use renders unreasonable the suggestion that a municipal project cannot have a storage feature because storage is not expressly authorized by the words of the Decree.

Finally, on March 9, 1992, at the hearing held in Pasadena to receive comments on a draft of this report, Nebraska announced the discovery of a newly-found plain meaning of paragraph X that precludes its application to Wyoming's Deer Creek project. Nebraska's current position is that all involved have been wrong in thinking of paragraph X as providing a *municipal* exemption because this will predispose one incorrectly "to examine a given project to determine whether by some reasonable standard it fits the exemption." March 1992 Transcript at 22. What one should do instead, Nebraska now insists, is focus on the language stating that the Decree "shall not affect or restrict" uses of water for municipal uses. Viewing the Decree in that light is said to yield a "very different analytic proclivity," which is to focus on the Decree's provisions that could affect or restrict municipal uses. "If none of the provisions resulted in such a restriction, no exemption in our view can arise." *Id.* at 22-24.

In arguing for her newly discovered plain meaning Nebraska contends that only those provisions of the De-

cree that are "decretal," *i.e.* those that impose express restrictions, fit within paragraph X's "affect or restrict" terminology. Thus, the various injunctions specifically set forth in the Decree would qualify for the application of paragraph X, but the paragraph V provision that merely divides natural flows 75/25 between Nebraska and Wyoming in the Whalen to Tri-State reach would not. It follows that if Nebraska claims (as she does in this case) that a proposed upstream project in Colorado or in Wyoming would merely diminish natural flows available in the pivotal reach, paragraph X does not apply as there is in that circumstance no injunction for paragraph X to sweep away. It would seemingly also follow that paragraph X could not be invoked in the case of any other municipal use in either Colorado or Wyoming, however appropriate and compelling that municipal use may be, except when paragraph X can negate specific injunctions.

Nebraska supports her new argument by referring to Wyoming's proposed text in her 1945 exceptions to the Court which, if adopted, would have provided:

> [T]hat the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and its tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock watering purposes.

March 1992 Transcript at 23. This argument, of course, stumbles over the fact that Wyoming's proposed formulation was not adopted and that the Court instead wrote language into paragraph X that made no mention of the injunctions.

More important, however, Nebraska's asserted plain meaning is not a common sense meaning one would readily read into language stating that municipal uses are neither to be affected nor restricted by the Decree.[103] Rather, the common sense reading of the words is that the specified uses set forth in paragraph X are simply to be allowed under the Decree and that the equitable apportionment pursuant to the Decree's remaining provisions act only upon the water remaining after "ordinary and usual" domestic, municipal and stock watering uses and consumption in Colorado and Wyoming.

[103] That it is not a plain meaning is illustrated by the United States' immediate response to Nebraska's interpretation at the recent hearing. Although the United States and Nebraska are in the same camp on the Deer Creek project, Ms. P. Weiss, speaking for the United States, conceded that she did not yet completely understand the new position announced by Mr. Simms, representing Nebraska. March 1992 Transcript at 81. Mr. Simms counselled patience and conceded the difficulty in communicating the interpretation orally. Mr. Simms stated "The argument, however, or the explanation, is very complicated, and it's very difficult to explain in oral argument. On paper I think it will become much more readily understandable." *Id.* at 120. Reading Nebraska's new position on paper, however, fails to convince that it captures the plain meaning of paragraph X.

Whether the proposed Deer Creek Project uses fit within the paragraph X exemption is a separate inquiry to which I now turn.

2. *The Application of Paragraph X to the Deer Creek Project*

a. *The Uses to be Served and the Need for Additional Supplies*

The evidence adduced thus far shows that Deer Creek was planned and designed initialy to serve several uses other than purely domestic and municipal uses. The Deer Creek FEIS prepared in connection with the application for a Section 404 permit discloses that Deer Creek uses also were to include irrigation, industrial, fish and wildlife, recreation, flood control, and possibly hydropower production. In addition, Wyoming's authorizing legislation and the project's state water permit allow the project yield to be devoted to non-municipal uses until the full yield is required for municipal uses. These facts present the issue of the application of the paragraph X exemption

to water projects not designed solely to serve domestic and municipal uses. Nebraska and the United States have urged that these multiple purposes disqualify Deer Creek from the exemption.

It has also been argued that Casper does not need and would in no meaningful sense make use of project water yields. Nebraska posits that Casper has ample municipal water supplies, that the communities involved appear to be declining in size, and that, in any event, there are more cost-effective alternatives than Deer Creek to gain such additional supplies as might be needed.

The contemplated non-municipal uses of the Deer Creek Project raise factual questions for trial on the extent of the non-municipal uses to be served by the project and their potential impact on the delicate balance of the river. Because such uses do not qualify for the paragraph X exemption, if they cause significant depletions they should not escape scrutiny under the paragraph XIII(c) reopener provision dealing with the construction of new storage capacity on the tributaries between Pathfinder and Guernsey Reservoirs. The same analysis might apply both to any early non-municipal uses preceding the need for municipal uses and any continuing non-municipal uses after municipal uses begin. While Wyoming might ultimately make the case for allowing *de minimis* early or incremental depletions from non-municipal uses, that case cannot be made in the absence of evidence showing the magnitude of the non-municipal depletions and their impacts on water supplies available to serve the Decree's apportionment.

Wyoming attempts to solve this problem by advising that she would proceed with Deer Creek even if the project were permitted to serve only municipal uses, but at this juncture Wyoming's offer does not dispose of the need for evidence to identify the various uses that such a reformulated project would actually serve and then

to determine how those uses would bear on the applicability of paragraph X.

On the subject of Wyoming's alleged need for additional municipal supplies, Nebraska has presented evidence that Casper and the other Wyoming municipalities to be served by Deer Creek are not growing as previously forecast and that there have actually been population decreases in some communities. Nebraska has further presented an expert's affidavit tending to show that even if more municipal water supplies are needed there is a range of better—that is, more cost-effective—ways to supply that water than Deer Creek. That expert testified, for example, that the cost of Deer Creek water would range from $235.42 to $353.12 per acre foot, in comparison to the least expensive alternative of $31.94 per acre foot to purchase rights from the Bureau of Reclamation's Kendrick Project. Affidavit of Raymond J. Supalla (Apr. 25, 1991), in Nebraska Response.

It will not be enough, however, for Nebraska simply to demonstrate that she disagrees on municipal needs or that Wyoming may not have chosen what Nebraska believes to be the optimal means to satisfy municipal needs. I have concluded that the Court in 1945 did not intend Colorado and Wyoming to be able to invoke the paragraph X municipal exemption only by meeting a standard to be devised by the Supreme Court. Paragraph X of the Decree surely leaves the initial decisionmaking on supplying municipal water needs to Colorado and Wyoming. On the other hand, neither Colorado's nor Wyoming's sole decisions on these matters can escape scrutiny or the Decree's apportionment would be subject to being subverted under the banner of the municipal exemption.

b. ***Project Operation and Water Rights Administration***

The United States has expressed concern that Wyoming not be empowered by any decision in these proceedings to

operate the Deer Creek Project in a manner that would be inequitable to downstream senior water users in Nebraska.[104] While I have previously concluded that paragraph X exempts consumption for domestic, municipal and stock watering purposes and thereby countenances some reductions in water supplies, it does not follow that equitable concerns of the sort raised by the United States cannot or should not be addressed. Therefore, one of the inquiries in the trial of the Deer Creek issues will be whether Wyoming's proposed operations and its contemplated water rights administration in connection with the proposed project will be fair and equitable to affected water users in Nebraska.

For example, there may be inequitable treatment of holders of senior Nebraska appropriative rights. Now that all parties are agreed that Wyoming will administer municipal water rights in priority, a circumstance might arise making it necessary for Wyoming to acquire senior water rights for a proposed municipal water project. The United States raises the specter of Wyoming invoking eminent domain powers that are available under Wyoming law to condemn only the water rights of impacted senior Wyoming water users, while adopting the rationale that paragraph X authorizes the reductions in supplies so far as Nebraska's senior users are concerned. Thus while both the Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just compensation only to the Wyoming water users. *See* March 1992 Transcript at 83-88.[105]

[104] As indicated previously, I am recommending summary judgment in favor of Nebraska and the United States that the Inland Lakes have a December 6, 1904 priority. As with all activities and developments on the North Platte River, I cannot ignore the interrelationship between that ruling and the paragraph X exemption. If municipal developments automatically override interstate priorities (either that of the Interstate Canal or Inland Lakes), my recommended ruling on the Inland Lakes might become ineffective. These types of questions make it important that we proceed to trial on the Deer Creek question to explore the status of the project under the Decree and the equitable allocation of its impacts in light of the paragraph X exemption.

Although judgment must necessarily be reserved until the precise effects of specific operational and water administration plans are carefully examined, it is appropriate at this juncture to note that concerns of the sort raised by the United States should be given appropriate consideration. Again, however, the recognition of the exempt status of municipal uses and consumption does not translate into a license for Wyoming to treat Nebraska's water users in ways that are not consonant with the equitable principles that apply in equitable apportionment proceedings.[106]

[105] Complex issues could arise concerning Wyoming's acquisition of senior water rights in both states.

[106] At the hearing on March 9, 1992, the United States argued that the administration of municipal water projects should be subject to the imposition of appropriate constraints to prevent inequitable treatment of the sort discussed. March 1992 Transcript at 85-91. Another way to approach the matter is to analyze the issue as a question of characterization and to disqualify from municipal classification in the first instance any projects that will not be administered in a manner that precludes the inequitable outcomes feared by the United States. At this point it is not necessary to determine which of these two approaches is better; it is enough for now simply to note that paragraph X should not become a license for Wyoming to achieve an inequitable outcome.

The United States proposed, at the March 9, 1992 hearing, that the municipal exemption be read so as to authorize Deer Creek storage only of "excess flows" after Nebraska's senior rights are satisfied. At that point, according to the United States, the municipal exemption can be invoked to bar Nebraska from challenging Wyoming's storage of "these excess flows that otherwise would flow into Nebraska." March 1992 Transcript at 83-84. The flaw in that approach is that it would strip paragraph X of any meaning except when supplies are plentiful, despite the Court's intention that the Decree "be based, as the Special Master recognized, on the dependable flow." 325 U.S. at 620. Further, the Court specifically contemplated that the Decree's constraints might be loosened if the then-prevailing drought conditions were to end. This leaves no room for

3. *Conclusion*

I recommend that the Court deny Wyoming's motion for summary judgment on Deer Creek and that we proceed to trial on Deer Creek issues. To determine whether Deer Creek qualifies under paragraph X of the Decree I will need to consider evidence on a range of factors.

First, I will examine the mix of uses to be supplied—residential, commercial, industrial, and so forth—and then determine whether that mix can reasonably be characterized as "municipal" under Colorado, Wyoming, and Nebraska water laws.

Second, I will take evidence on the need for additional supplies to meet municipal uses, taking account of existing supplies and demands and forecasts. In this regard, I will pay appropriate heed to efficiencies mandated by water law and practice in the three states.

Third, I will examine and evaluate the Deer Creek Project itself to determine whether it is appropriately conceived and designed to be administered so as to meet the municipal needs that ostensibly justify the project, including whether it represents a reasonably efficient use of water toward that end. If uses other than municipal will consume any substantial part of Deer Creek's annual yield, I will examine the magnitude of those depletions to determine whether they affect the delicate balance of the river and should alter the characterization and treatment of the project. In that connection, I will consider whether early or incremental non-municipal depletions should be subject to scrutiny under paragraph XIII(c) dealing with new tributary storage capacity between Pathfinder and Guernsey reservoirs.

Finally, I will examine operational plans and proposed water rights administration to determine whether the project could result in inequitable treatment of water

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the argument that the exemption should apply only when supplies can satisfy all water rights.

users in Nebraska relative to similarly situated water users in Wyoming.

V. DOWNSTREAM OF TRI-STATE

A. Background

The downstream of Tri-State issues arise from the design and operation of the two large United States Bureau of Reclamation projects on the North Platte River and their downstream effects. By far the more important is the North Platte Project, which includes the Pathfinder and Guernsey Reservoirs in southeastern Wyoming and downstream diversion canals in the pivotal Whalen Dam to Tri-State Dam reach of the river. The project canals and also private canals in that reach divert both project storage water from the up-river federal reservoirs and natural flows for delivery to numerous farms in southeastern Wyoming and far into western Nebraska.

By the time the original proceedings began in 1934, North Platte Project operations had brought enormous changes to the southeastern Wyoming and western Nebraska landscapes. Among those changes was a dramatic increase in irrigation return flows, bringing substantial benefits to Nebraska lands down-gradient of the lands directly served by canal deliveries. In the original proceedings Special Master Doherty found that return flows in the two-state area had increased from a negligible quantity in 1911 to 700,000 acre feet in 1927. Doherty Report at 33. Those return flows figured prominently in the original proceedings and affected the apportionment that Nebraska ultimately received in the Decree.[107]

Nebraska initially claimed that any equitable distribution of the North Platte's flows should extend to all irri-

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[107] The return flows brought downstream environmental and wildlife benefits as well as irrigation benefits and are, therefore, of concern to the environmental *amici* as well as to the United States and Nebraska.

gated lands in Nebraska as far east on the Platte River as Grand Island in central Nebraska. By the end of the case, Nebraska had agreed that lands east of Bridgeport, Nebraska, some sixty miles east of the Wyoming-Nebraska line, reasonably could be satisfied from local supplies including upstream irrigation return flows. 325 U.S. at 607. In the end, both Special Master Doherty and the Court determined that local seasonal supplies were adequate to fill the needs of all Nebraska canals diverting from the North Platte mainstem downstream of the Tri-State Dam, one mile east of the state line. Accordingly, no river sections east of the Tri-State Dam were included in the equitable apportionment. *Id.* at 654-55.

In view of Special Master Doherty's conclusion that the equitable apportionment would not permit Nebraska to demand direct flow water from above Whalen for uses below the Tri-State Dam, the United States contended that the Decree should limit Nebraska's share "to that which was in fact being diverted and used by the canals between Whalen and the Tri-State Dam within the specified limitations in acre feet and second-feet." *Id.* at 628. The United States worried that in the future, as in the past, Nebraska might intentionally permit water to pass the Tri-State Dam for downstream uses. The Court concluded, however, that if the Decree were ever to be administered "as the United States fears . . . so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree." *Id.* at 628-29.

In the present proceedings the concerns of Wyoming mirror the concerns articulated by the United States in the original proceedings. Wyoming also worries that Nebraska will attempt to call for upstream flows in excess of her apportionment with the intent to route those flows in some manner downstream of Tri-State Dam. Once such flows have made their way downstream, Wyoming apparently also fears future Nebraska claims that Wyoming's proposed upstream water projects might be en-

joined because combined natural flows and storage water releases might be insufficient to satisfy the lands served by the Decree's apportionment.

Although Nebraska did not receive an apportionment of downstream of Tri-State natural flows, there has been heated debate in the present proceedings over exactly what rights Nebraska does have in the downstream return flows contributing to those local supplies that the Court found adequate to meet her needs in 1945. Nebraska has labelled those local supplies the "predicate" for the Court's decision and argues that the resulting local supplies east of Tri-State Dam serve important equities, including both wildlife and irrigation interests. Nebraska insists that those return flows are part of the "regimen of the river" contemplated by the Decree in which she has enforceable rights.[108]

[108] On occasion Nebraska has even taken her argument a step further, urging that the preservation of the "regimen of the river" must entail taking whatever upstream measures may be required to assure the continuation of "historic flows." The deposition testimony of J. Michael Jess, the Director of the Nebraska Department of Water Resources, suggests just such a claim. Mr. Jess was asked whether it is Nebraska's position "that the return flows should remain unabated coming from the federal project in the State of Wyoming into Nebraska." He answered "I believe so, it is." Deposition of J. Michael Jess, Vol. IV at 164. Further, Nebraska has contended that "Nebraska's collective equities have a right to continued supplies equaling historical averages or the Decree will be undermined." Nebraska Response to 52-53. Nebraska's historic flow thesis is unsound to the extent Nebraska means to suggest that the Decree imposes upstream obligations on Wyoming to immunize return flows from impacts caused by natural annual fluctuations in supply. The underlying theory of the 75/25 division of natural flows in the Whalen to Tri-State reach is that the parties will share the supplies that are available, in the stated proportions, both in good years and in dry years.

Colorado expresses justifiable concern over Nebraska's suggestion of claims respecting "collective equities equaling historical averages." Sustaining that position would, indeed, cause anxiety in Colorado over potential prejudice for not having fully used the share allocated to her in paragraph I of the Decree. As she argued on

By contrast, Wyoming and Colorado take the position that Nebraska has no rights under the Decree downstream of Tri-State independent of her right to protect the upstream apportionment for those lands that are directly served by the canals diverting at and above the Tri-State Dam. In their view, Nebraska's entitlement to relief for diminished return flows downstream can exist, therefore, only after a finding is made first of a violation of her upstream of Tri-State apportionment. If such an upstream violation is, in fact, established, the two upstream states concede that any resulting Nebraska injuries downstream of Tri-State would be compensable.

On the opposing motions for summary judgment concerning the cluster of issues grouped under the downstream of Tri-State heading, I find myself largely in agreement with the United States that they:

> [A]re too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record, a particular concern in litigation between states and in equitable proceedings.

United States Post-Argument Comments at 6. Neither motion has crystallized the issues such that they are presently postured—*i.e.*, ripe—for resolution. Although the summary adjudication sought is therefore premature, there is nonetheless one subsidiary question that can be answered now: I recommend that the Court rule that the Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis.

B. Wyoming and Colorado Motions

In her counterclaim, Wyoming asserts that Nebraska has intentionally circumvented and violated the Decree:

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summary judgment, Colorado "should not be placed in a 'use it or lose it' situation with regard to her apportionment." June 1991 Transcript at 156-57.

> (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
>
> (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree.

Wyoming Answer and Counterclaim at 8-9. Wyoming has not moved for summary adjudication on her counterclaim as such. Rather, she seeks a partial summary judgment that would prevent Nebraska from developing and using certain evidence in these proceedings. She asks for a ruling to "confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree." Wyoming Brief at 5. Wyoming takes the position that such evidence can be offered for the purpose of establishing injury only "if Nebraska first proves a violation of her [upstream of Tri-State] apportionment" under the Decree. *Id.*

Colorado adopts much of Wyoming's motion. Colorado asks that evidence of uses below Tri-State be excluded from these proceedings as immaterial, until Nebraska proves a violation of her upstream apportionment. Colorado Motion for Partial Summary Judgment (Feb. 25, 1991) at 4. In addition, Colorado seeks judgment in her favor on any Nebraska claims that Colorado is violating or threatening to violate the Decree by allegedly reducing direct flows passing Tri-State or certain return flows. *Id.* at 3-4. Colorado argues even more stridently than Wyoming that Nebraska, in seeking to protect water rights below Tri-State, is attempting to shroud what is actually a petition to modify the Decree. If water supplies below Tri-State decrease primarily because of decreased return flows, Colorado asserts that Nebraska

should in a straightforward manner file a petition for a new proceeding under paragraph XIII(f) of the Decree, which explicitly contemplates future modifications for "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." For Nebraska to attempt to address her concerns via claims about the "predicate of the apportionment" or "regimen of the river" is, in Colorado's view, to make arguments based on "sophistry and semantic smoke screens." June 1991 Transcript at 153-65.

The specific issue to be addressed at this point is the appropriateness of ruling on whether Nebraska's as yet unseen evidence of injury or threatened injury to her interests downstream of Tri-State will be material to whether Wyoming or Colorado has violated Nebraska's decreed apportionment. At this stage, however, it is premature to enter an order advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material. To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment. Even though it might seem difficult to conceive of another manner in which the upstream states might wrongfully impede the return flows contributing to downstream local supplies, there is no wisdom in ruling on that question in the abstract.

Nebraska makes an important point in labelling the downstream return flows a "predicate" to the 1945 Decree. The Court did use evidence of the reliability of those flows even in dry years as the basis for deciding that Nebraska did not require an apportionment downstream of the Tri-State Dam. There is, therefore, reason to proceed cautiously until Nebraska has developed her factual case. As the United States has pointed out, there has been "no factual development concerning either

the quantities of water involved or the uses or non-uses of that water." United States Response at 18.

In the course of the briefing and argument respecting summary adjudication, however, one contention emerged that can and should be resolved now. Wyoming has asked for a summary ruling declaring that the beneficial use requirements that were determined in the original proceedings for the several canals diverting between Whalen and the Tri-State Dam are absolute ceilings for Nebraska's diversions on a canal-by-canal basis. The uncontradicted facts do not establish Wyoming's claim; instead, they lead to the opposite conclusion, requiring a ruling in favor of Nebraska on this question.

While it is true that Special Master Doherty took comprehensive evidence on the irrigation of Nebraska lands served by the canals diverting at and above Tri-State Dam and he calculated the beneficial use requirements of those lands, the Record makes clear that he did so in order to construct a basis for determining the proper shares of the natural flow to be apportioned to the two states in the pivotal Whalen to Tri-State reach. The 1945 Record also demonstrates that the Decree left to Nebraska and to Wyoming the administration of their respective 75 percent and 25 percent shares of the natural flow. Special Master Doherty's recommendation in his Report is unequivocal on that issue, and neither the Court's opinion nor the final Decree afford any basis for concluding that his recommendation was rejected by the Court.

Indeed, the Doherty Report addressed this matter with particular care when explaining that a distribution of natural flow on a percentage of daily flow basis would avoid the problems of the interstate priority allocation urged by Nebraska and the mass allocation urged by Wyoming:

> The quantities would vary from day to day, but the proportions would remain constant. Under this

method each State would participate proportionately and immediately in all variations in supply. *The share of each State, determined by the established ratio, would be subject to administration by that State in any manner it saw fit or the rights of its appropriators might require.*

. . . .

. . . In arriving at the equitable share of each State I have first determined for that purpose the requirements of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.

Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals . . . I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water between them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. *Consequently, the findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.*

Doherty Report at 150, 160-61 (emphasis added).[109]

Thus, it is undeniable that the Special Master's painstaking analysis of the relative priorities and beneficial use requirements was key to his proposed 75/25 division of the natural flow in the Whalen to Tri-State reach. In adopting the Special Master's recommended division and ordering the apportionment, however, the Court did not differ with Mr. Doherty's conclusion that the administration of the shares so apportioned should be left as an intrastate matter. The Court stated:

> We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. *The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified.*

325 U.S. at 627 (emphasis added).

As to four canals with headgates in Wyoming that serve Nebraska lands, Nebraska was given the express right in paragraph V of the Decree "to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals." That provision was deemed necessary because Wyoming could not be counted on to respond to Nebraska's instructions unless ordered to do so. June 1991 Transcript at 131-32. The provision makes no mention of canal ceilings and implies no more than an overall ceiling by its reference to designations from Nebraska's "share." Thus, it is

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[109] It is noteworthy that in the course of the original proceedings Wyoming argued "no allocation can be made to individual appropriators in any of the States because they are not parties and cannot be bound in their absence." 325 U.S. at 626.

reasonable to conclude that Nebraska cannot designate more than its apportioned share, but that within that share Nebraska may make designations for deliveries to the canals as her own internal water laws and policies may dictate.

Wyoming makes much of the provisions contained in the Decree establishing interstate priorities between the canals diverting in the Whalen to Tri-State reach on the one hand and the upstream federal reservoirs in Wyoming on the other. It is true that, as recommended by Special Master Doherty, the Court enjoined Wyoming "from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs . . . otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals," Decree ¶ IV, all of which canals were adjudged to be senior to the four named federal reservoirs. It does not follow, however, that the specified diversion limitations set forth in the Decree were established as absolute ceilings or that further diversions into those canals were necessarily forbidden by the Decree. The Decree contains no express injunction to that effect, and there is no basis on which to imply one.

Wyoming insists that the very establishment of the priorities between the canals and the reservoirs dictates recognition of ceilings under general principles of western prior appropriation law. That, however, is so only to the extent that the junior reservoir rights necessarily come into priority when the senior canal appropriations have been satisfied. Should the junior reservoirs already be filled or for any other reason fail to store, there is nothing in the Decree that requires the downstream canals to refrain from diverting water merely because the senior rights have already been satisfied. Further, there is nothing in the Decree that can be read to forbid shifting

deliveries among the senior canals so long as the junior storage rights of the reservoirs are not harmed thereby.[110]

Wyoming cannot sustain her burden for partial summary judgment on this issue. The language of the Doherty Report, the Court's Opinion and the Decree is clear on this. The beneficial use requirements for the canals determined by Special Master Doherty in the original proceedings do not constitute decreed ceilings for diversions for each of those canals. Thus, I recommend that the Court rule for Nebraska on that point.

That the deliveries on a canal-by-canal basis are not limited, however, does not leave Wyoming helpless should Nebraska's total up-river calls for diversions into the canals be found to exceed Nebraska's rights under her apportionment. If, as Wyoming fears, there should be any such abuse by Nebraska, Wyoming may petition the Court for relief. That, of course, is precisely the recourse the Court contemplated would be available to the United States were Nebraska improperly to divert water from above Tri-State for the use of lands below Tri-State. *See* 325 U.S. at 628-29.

C. Nebraska's Motion for Partial Summary Judgment

What is said above about Wyoming's motion also applies to Nebraska's motion for partial summary judgment. With respect to the downstream of Tri-State issues Nebraska asks for determinations that:

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[110] In the course of weighing the "requirements" of the various canals in order to determine an equitable apportionment, the Court commented on Special Master Doherty's finding that there were historic canal diversions greater than the determined requirements in seven years during the 1931 to 1940 drought period. Among those canals that had excess diversions were nine canals serving only Wyoming lands. Despite full awareness of this pattern, no injunction was recommended by Special Masier Doherty or issued by the Court to prevent such excess diversions from occurring in the future. 325 U.S. at 604-06.

> Nebraska has an equitably cognizable interest under the North Platte Decree to return flows from North Platte waters resulting from the equitable apportionment of North Platte waters diverted at or above Tri-State Dam. The return flows and other local supplies in the North Platte River below Tri-State Dam were expressly counted in the determination of the equitable apportionment between Nebraska and Wyoming, and the Special Master and the Court recognized that the apportionment would be undermined if return flows were decreased. Unavoidable operational "water" flowing past Tri-State Dam is not a violation of the Decree. Storage water was not apportioned by the Court. Nebraska can administer its equitable apportionment intrastate according to Nebraska law, and the Court did not restrict diversions or irrigated acreages of Nebraska appropriators.

Nebraska Brief at 7-8.

On all but its last sentence, Nebraska's motion also suffers from being "too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record." United States Post-Argument Comments at 6. Nebraska, like Wyoming, seeks answers to abstract questions about the nature of her "rights" with respect to downstream of Tri-State return flows and other local supplies, but thus far has not pointed to evidence of specific harms or specific actions by Wyoming that are alleged to have caused or that threaten such harms. For the same reasons that I decline to give the abstract advice sought by Wyoming's motion, I decline to give such advice in response to Nebraska's motion.

The exception to the foregoing, as indicated above, is Nebraska's request for a ruling that her 1945 equitable apportionment did not restrict diversions or irrigated acreages of Nebraska appropriators on a canal-by-canal basis. That recommended ruling is encompassed within the recommended ruling on Wyoming's motion for summary adjudication respecting her counterclaim.

VI. THE RENEWED MOTIONS FOR INTERVENTION

A. Background

The June, 1989, First Interim Report explained my reasons for denying petitions to intervene filed by five separate petitioners. At that time, however, I did grant *amicus curiae* status to each of the petitioners and most of the *amici* have since participated to some degree in the current proceedings.

At oral argument on the summary judgment motions in June, 1991 I solicited comments from those *amici* present on the extent to which they had succeeded in the ensuing two years in presenting their concerns in these proceedings. After listening to their comments, I stated that I would consider renewed applications to intervene from any *amicus* believing it should now be granted party status. June 1991 Transcript at 293.

New motions to intervene were subsequently filed by The Platte River Trust, Audubon, and Central. By letter dated July 24, 1991, Basin advised that it was no longer pursuing its then-pending request to intervene but asked that its motion "be granted in the event that one or more of the current motions to intervene of the other *amici* are granted."[111] I recommend that the court deny the renewed motions to intervene.

In reviewing the renewed intervention petitions, I have applied the same standards that I followed in April, 1988 in denying the *amici's* initial motions to intervene. Original actions are clothed in a mantle of flexible procedure. *See, e.g., Grayson v. Virginia*, 3 U.S. 320 (3 Dall. 320) (1796); *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895). Resolution of disputes in this context traditionally has not been held hostage to procedural technicalities. While S. Ct. R. 17.2 provides that, insofar as

[111] Basin Electric Power Cooperative's Memorandum In Opposition To Motions Of *Amici* To Intervene (Aug. 23, 1991) ("Basin Intervention Opposition") at 1 n.1.

appropriate, the Federal Rules of Civil Procedure shall govern procedure in original actions, Fed. R. Civ. P. 24 does not necessarily apply to motions for intervention in an original case. *See, e.g., Utah v. United States*, 394 U.S. 89, 95 (1969) (*per curiam*). Thus, while Fed. R. Civ. P. 24 lends structure to the intervention analysis here, the applicable standards are found in other original actions.

A private party ordinarily has no right to intervene in an original action, but may be permitted to intervene if he can satisfy the "burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953); *see also Colegrove v. Green*, 328 U.S. 549 (1946); *Kentucky v. Indiana*, 281 U.S. 163 (1930). Further, the case at hand must, in fact, adjudicate rights belonging to the intervenor, *see Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965), and have a *stare decisis* effect with respect to those interests.

Policy considerations favoring intervention include fairness to non-parties, protection of interests that will be affected by principles of *stare decisis*, collateral estoppel and *res judicata*, full exposition of the issues, and promotion of judicial economy. These considerations must be balanced against the need to prevent unnecessary expansion of the scope of the action and to avoid confusion, delay and inefficient administration of justice. Further, the parties to an action must be protected against the prejudice and additional litigation obligations (*e.g.*, discovery, experts and evidence-gathering) that might be caused by adding intervenors. *See* Fed. R. Civ. P. 24(b); 3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 24.10[4] (2d Ed. 1987); *see also* J.H. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, 13 U.C. Davis L. Rev.

259, 263 (1980). All of these considerations are cloaked, further, in the strong policy that original jurisdiction "should be invoked sparingly." *Utah v. United States*, 394 U.S. at 95.

In finding that none of the three would-be intervenors has met those standards, I note that it remains the case that their interests will either be represented by a party to these proceedings or will not be adjudicated in these proceedings. In the cases of Audubon and the Platte River Trust, their central Nebraska wildlife interests can largely be safeguarded in more suitable forums, sanctioned, if necessary, by appropriate language in the decree in this case. To the extent these interests enter into these proceedings, I rely upon the United States to develop and represent them. As for Central, the interests it espouses must also be dealt with in other forums, including Nebraska's intrastate water proceedings.

Ultimately, no *amicus* has made the case for changed circumstances since June, 1989 that warrant a different outcome. As in 1989, I again invite the *amici* to continue their participation in the case and urge appropriate collaboration between the *amici* and those parties with whom their interests are aligned. The *amici* may move for enhanced participation upon a showing of good cause if they find themselves unable to work through the channels I have established to have their interests heard. *See* March 1992 Tanscript at 109-11.

B. The Platte River Trust and Audubon Intervention Motions

The arguments for intervention invoked by the Platte River Trust and by Audubon largely echo their 1989 arguments. Both express concern over the need for river flows in the critical wildlife habitat areas in the Platte River's Big Bend Reach in central Nebraska downstream of the Tri-State Dam, and both urge relief in these proceedings to protect that habitat and the wildlife that is dependent

on it. Both also express disappointment over the failure of the United States so far to develop a factual record on the current plight of the habitat and on the potential threat of further harms from unconstrained water developments in Wyoming.

The Platte River Trust's motion differs from that of Audubon in that the Trust first asks to be granted "a more active litigation role in the case" but expresses a willingness to become a party should I determine that representation of environmental and wildlife interests below Tri-State Dam require that it become a full party. There is only a sketchy description of what its more active role might entail, but mention is made of affording the Trust greater opportunities to participate in developing expert studies and reports for the evidentiary record, participating in presenting testimony and cross-examining experts, and collaborating in "drafting study protocols as necessary to close gaps in the Record." [112]

There is in my judgment no merit in granting the motion insofar as it seeks a "more active litigation role," because that would add little to the status the Trust already enjoys as an *amicus*. I have granted all *amici* the privilege to present affidavits, file briefs, and, "upon a showing of good cause," participate more fully respecting key matters in the proceedings. That flexible status seems preferable to the attempt to define a more novel role of the sort the Trust envisions. I have always seen the *amici* as potential sources of expertise and will continue to do so.[113]

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[112] Motion Of Platte River Trust For A More Active Litigation Role Or Reconsideration Of The Issue Of Its Intervention (Aug. 9, 1991) at 10.

[113] The Trust's motion also asks that, as Special Master, I independently retain experts for the purpose of developing the record on wildlife and environmental concerns in a non-adversary setting. Platte River Trust Motion at 11-14. That suggestion is not meritorious in view of the commitment of the United States to address those concerns and the latitude already given to the *amici* to contribute to addressing them.

Turning to the question of party status, I have determined again that the Court should deny full party status to the Platte River Trust and Audubon for two separate reasons. First, neither has shown that the United States has defaulted in its express commitment to meet its responsibilities to represent environmental and wildlife values, nor demonstrated that they will be denied opportunities to work with the United States (and Nebraska as well) in developing aspects of the case that implicate those values. Second, this Court ultimately will in most instances prove a less suitable forum for safeguarding environmental values than other forums, and those other forums need not be constrained from functioning effectively by a decree in the present proceedings.

With respect to its responsibilities on environmental and wildlife concerns, the United States has made the cogent point that it is too early to brand it neglectful of its duties. At this summary judgment stage, the United States certainly is not barred from continuing the development of the case and discharging the commitment it has made to represent both federal reclamation and fish and wildlife interests. The United States, in its opposition to the intervention motions, has called attention to extensive efforts under way both in connection with these proceedings and outside of these proceedings to gather information and seek solutions to the downstream of Tri-State wildlife habitat concerns.[114] Obviously, the United States has not satisfied the Trust and Audubon in this regard, but no case has been made that the United States has defaulted or will default in this important responsibility or that it will fail to work cooperatively with the *amici*.

On the second reason for denial, the history of the North Platte teaches that other forums for environmental claims have been available and that they are more suit-

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[114] *See* United States Response To The Intervention Motions Of The Platte River Trust, The Audubon Society And The Central Nebraska Public Power And Irrigation District (Sept. 3, 1991).

able than this Court acting in an original jurisdiction case. The instant case had its genesis in long-standing disputes about the allocation of an interstate stream among Colorado, Wyoming and Nebraska dominantly for agricultural uses. The environmental claims to the stream flows that have arisen before the current proceedings have in fact been addressed in other forums. Immediate examples include the 1970's litigation over the possible wildlife impacts of Basin's now-operating Grayrocks Project on the Laramie River in Wyoming, and the pending litigation over Wyoming's proposed Deer Creek Project upstream of Whalen, Wyoming. *See* Basin Intervention Opposition at 7-9.

Both the Platte River Trust and Audubon have expressed serious concerns that other forums may be constrained from effective action by the outcome in these proceedings. The Trust contends that the Court's decision on the quantity of water to which Nebraska is entitled "will delimit the outcome of any case addressing the management of that quantity within Nebraska." Platte River Trust Motion at 7. While that is not a wholly groundless fear, there are effective ways to address it short of this Court sweeping into these proceedings the implementation and enforcement of all federal environmental laws.

In a similar vein to the Trust, Audubon expresses the fear that the Decree could make it awkward for Audubon to enforce the Endangered Species Act "because, as a practical matter, a lower court would be unlikely to require Nebraska or the United States to disregard the Court's decision in this case, even if necessary to protect the river's endangered species." [115] If at the conclusion of this case such a fear seems justified, it will be a simple matter to include appropriate language in the final decree explicitly stating that the decree is not intended to circumscribe in any way the application of federal environ-

[115] Petition Of The National Audubon Society For Reconsideration Of Motion For Leave To Intervene And Brief In Support Of Petition For Reconsideration (Aug. 2, 1991) at 9-10.

mental laws. The message can surely be delivered that an equitable apportionment does not immunize from such laws the shares of the river apportioned to the opposing states. *See New Jersey v. New York*, 283 U.S. 336, 344, 348 (1931).

As underscored by Basin, the existence of the 1945 Decree has not in fact proven a barrier to litigating any environmental claims arising out of proposed water projects. As Basin notes, "[s]imply because, as between two states, the waters of a stream are apportioned in a certain way, does not mean that a project in one of them operated, licensed or permitted by the federal government to utilize water within that state's apportionment is exempted in any way from compliance with these laws." Basin Intervention Opposition at 5-6 (footnote omitted).[116]

[116] In the National Environmental Policy Act ("NEPA") of 1969, Congress authorized and directed that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." NEPA § 102, 42 U.S.C. § 4322. It is no stretch, therefore, for this Court to conclude that it, too, should be mindful of NEPA's environmental policies when fashioning equitable apportionment decrees. Thus, the Court might in some circumstances qualify a state's apportionment with a proviso that the granting of the apportionment does not remove the need to comply with federal environmental laws, or cautioning that the state's apportioned share might have to remain in the stream to the extent instream flows are needed to safeguard environmental values protected by these laws.

To qualify a state's equitable apportionment in the manner suggested would be comparable to qualifying an appropriative water right with a proviso that it cannot not be exercised in a manner that violates state environmental policies. Just such a step was taken by the California Supreme Court in *National Audubon Society v. Superior Court*, 658 P.2d 709, 33 Cal. 3d 419 (1983). That court held that California appropriative water rights of the City of Los Angeles were subject to being curtailed by the state's public trust doctrine. The city's long-standing water rights in eastern Sierra Nevada streams flowing into Mono Lake were, therefore, found to be subject to being cut back to safeguard the Mono Lake environment. The court explained that the public trust "prevents any party

Accordingly, I recommend that the Court deny the intervention motions of the Trust and Audubon and that *amici* look to other potential forums for vindicating federal environmental laws. By recommending denial I do not suggest that there is no meaningful role for the United States to play as a party in this proceeding respecting environmental and wildlife concerns. To the contrary, I reaffirm what I have previously stated concerning my expectations of the United States in that regard.

C. The Basin Intervention Motion

For the reasons set forth above in addressing the motions of the Trust and Audubon, it is also appropriate to dispose finally of Basin's pending motion to intervene. On March 29, 1989, when Basin was displeased with its *parens patriae*, Wyoming, it renewed its motion to intervene. Now that Basin has taken the position that it seeks intervention only if party status is granted to the other *amici* petitioners, it is appropriate to close this chapter for Basin also. Accordingly, I recommend that the Court deny Basin's pending motion to intervene.

D. The Central Intervention Motion

The sole ground urged by Central for intervention is the existence of competing demands on the water supply within Nebraska.[117] That there are competing claimants

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from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." 33 Cal. 3d at 445. *See also United States v. Glenn-Colusa Irrigation District*, 1992 WL 41634, at *7 (E.D. Cal. Jan. 9, 1992) (the Endangered Species Act "provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act. Moreover, enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights.").

[117] Motion Of The Central Nebraska Public Power And Irrigation District For Leave To Intervene As Plaintiff, Complaint In Intervention And Memorandum In Support Of Motion For Leave To Intervene As Plaintiff (Aug. 2, 1991) at 3, 7.

for water in arid regions is self-evident, but that has never been regarded as disabling a state from acting *in parens patriae* for all its water claimants. Those competing demands should be worked out within the state and should not be preempted by an original jurisdiction decree that both apportions water to the state and then intrudes further to dictate the allocation within the state of that state's apportioned share. In the 1945 case, as previously noted, the Special Master and the Court took pains to interfere as little as possible with the intrastate administration of the apportionments under the Decree. *See supra* at 95-97. Thus, I recommend that the Court deny Central's motion to intervene.

VII. CONCLUSION: PROPOSED FORM OF ORDER

In accordance with the above, I recommend that the Court enter the following form of Order:

This case having been submitted on the report of the Special Master dated April 9, 1992 [and the exceptions of the parties thereto],

IT IS ORDERED that Nebraska's motion for summary judgment that the Inland Lakes in Nebraska have a priority right of December 6, 1904, to store at least 46,000 acre feet of water during the months of October, November, and April is hereby GRANTED; and

IT IS FURTHER ORDERED that the United States' motion for summary judgment that the Interstate Canal in Wyoming has a priority right of December 6, 1904, to divert natural flow from the North Platte River for storage in the Inland Lakes, and that the Guernsey and Glendo reservoirs have the right to store water temporarily before transfer to the Inland Lakes, is hereby GRANTED; and

IT IS FURTHER ORDERED that Nebraska's motion for partial summary judgment that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis is hereby GRANTED; and

IT IS FURTHER ORDERED that all other motions for summary judgment or partial summary judgment are DENIED; and

IT IS FURTHER ORDERED that all motions for intervention are DENIED; and

IT IS FURTHER ORDERED that the decree of October 8, 1945, 325 U.S. 665, as modified in 1953, 345 U.S. 981, is hereby supplemented as set forth below:

1. A new paragraph is added to the decree, as follows:

> XVIII. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from interfering with the December 6, 1904, priority right of the Inland Lakes in Nebraska to store no less than 46,000 acre feet of natural flow water during the months of October, November, and April, the December 6, 1904 rights of the Interstate Canal to divert natural flow waters in Wyoming for storage in the Inland Lakes, and the right of the Guernsey and Glendo Reservoirs to store that flow temporarily during the winter months for the ownership account of the Inland Lakes.

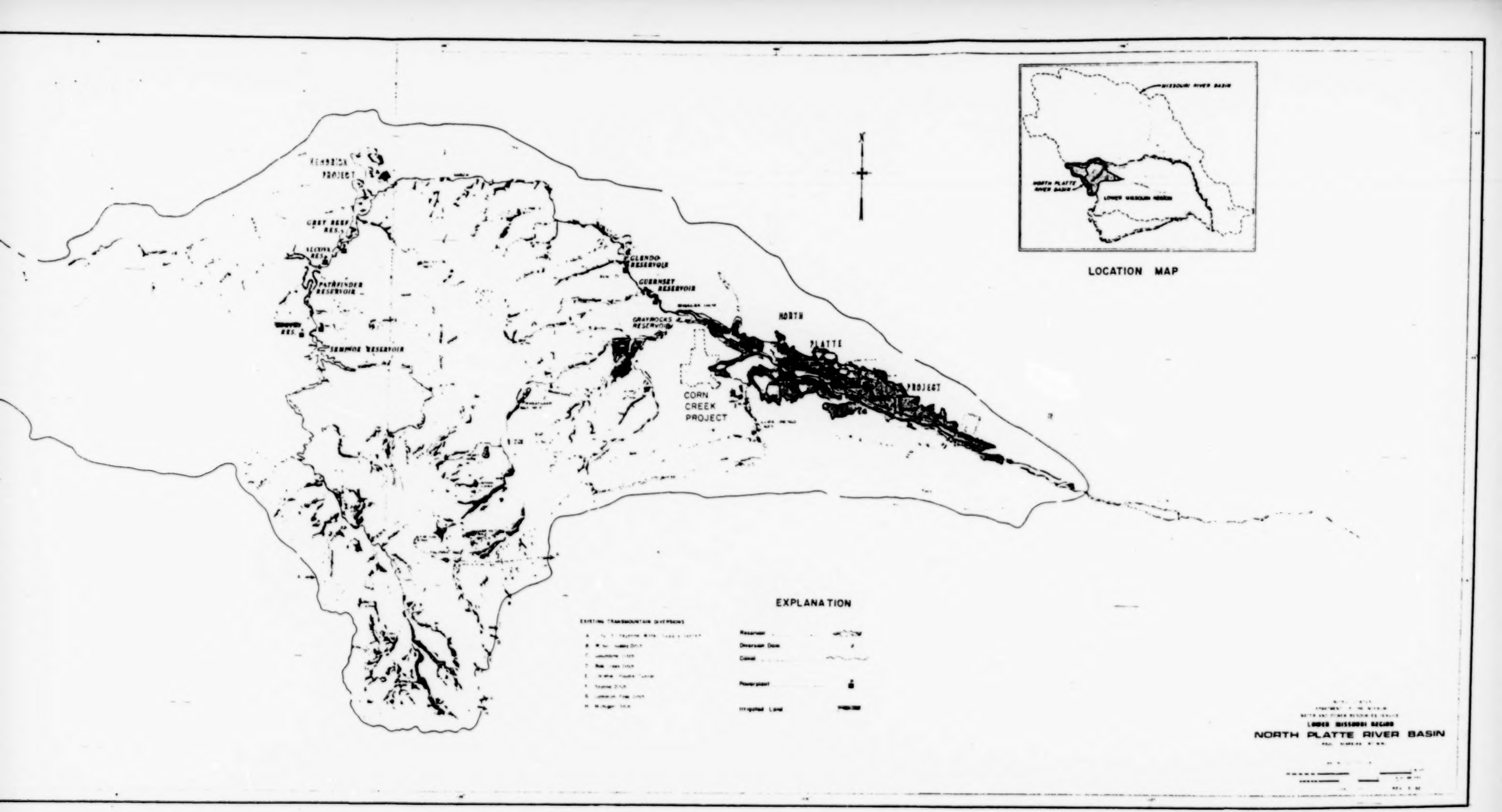
2. Paragraph XIII of the decree is amended to add new subsection (g), as follows:

> (g) The question of the effect upon the rights of Nebraska or the United States of future water rights administration by Wyoming of the Laramie River that interferes with or threatens to interfere with the flow releases and other obligations of the parties to that certain Agreement of Settlement and Compromise dated December 4, 1978, in *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. 1978).

Respectfully submitted,

OWEN OLPIN
Special Master

APPENDICES



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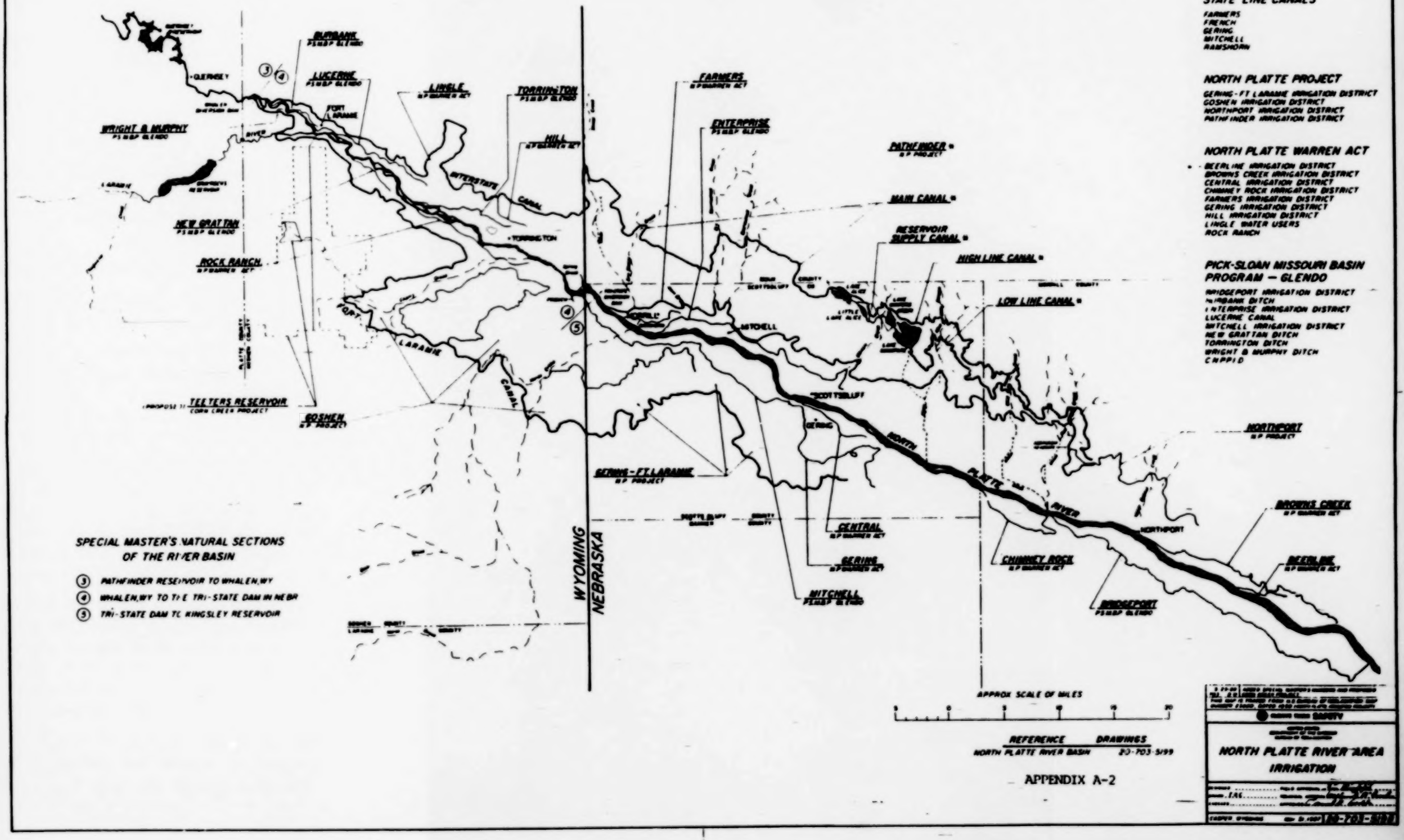

APPENDIX A-2

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APPENDIX B

The North Platte Decree
325 U.S. 665 (1945),
as modified
345 U.S. 981 (1953).

DECREE.

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals. Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water

in Pathfinder, Guernsey, Seminoe, Alcova, and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascer-

tainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthy evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for

the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be

required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities[;]

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies[;]

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953 the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming[;]

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage ~~to the river~~ of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree fully authenticated under the seal of this Court.

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice

to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.